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Monday
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Briefings on How To Use the Federal Register
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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

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2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

DURHAM, NC

WHEN: March 20, at 9:30 a.m.
WHERE: Duke University,
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Durham, NC.
RESERVATIONS: 919–684–3030.

SALT LAKE CITY, UT

WHEN: March 29, at 9:00 a.m.
WHERE: State Office Building Auditorium,
Capitol Hill,
Salt Lake City, UT.
RESERVATIONS: Call the Utah Department of
Administrative Services, 801–538–3010.

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 550

RIN 3206-AC41

Pay Administration (General); Severance Pay

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is adopting a final rule to make certain changes in the conditions under which Federal employees are entitled to severance pay when they are involuntarily separated from Federal service. Under these final regulations, employees will not lose entitlement to severance pay if they accept a position with a successor contractor within 90 days after their separation. Also, entitlement to severance pay *will* be lost if the employee refuses a "reasonable offer" of another position in the agency, rather than an "equivalent position." This reconciles the eligibility criteria for severance pay and discontinued service retirement. A number of other provisions of the severance pay regulations have been clarified and updated.

EFFECTIVE DATE: March 28, 1990.

FOR FURTHER INFORMATION CONTACT: Frank J. Derby, (202) 632-5056.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) published proposed regulations on severance pay in the **Federal Register** (54 FR 23215, May 31, 1989), providing that interested persons could file comments through July 31, 1989. We received comments from twelve agencies, three labor organizations, one employee organization, and five individuals. Following is a summary of the comments received from Federal agencies, employee organizations, and employees and the changes incorporated in the final rule in response to those comments.

Comments on elimination of contracting-out restrictions. Two labor organizations and one individual expressed their objections to the contracting-out of Governmental functions in general. One labor organization stated that contracting-out has not been proven cost effective and that a larger investment in employee training would improve efficiency. Such concerns are outside the scope of the present regulations.

One commenter suggested that severance pay be available to any employee who loses a Federal position due to contracting-out and that this change be made retroactive for a 5-year period. Removing all eligibility criteria for severance pay in a contracting-out situation would defeat the purpose of severance pay and could not be justified as facilitating the transfer of Federal functions to private contractors. We find no justification for making any of our proposed changes retroactive.

One agency suggested that OPM may wish to consider authorizing severance pay for employees who resign to go to work for the contractor after the contract is signed, but *before* the official reduction-in-force (RIF) notice is issued. Such a change might be of some benefit to the contractor in bringing on key employees, but is at odds with the purpose of the severance pay law, which is intended to provide severance pay only to employees who actually are to be separated.

One commenter recommended that the restriction on severance pay for military retirees be lifted, and an agency suggested that a similar restriction on employees eligible for civil service annuities be eliminated. Those restrictions are statutory (5 U.S.C. 5595(a)(2)(iv)) and cannot be altered by regulation.

The proposed change to eliminate the severance pay restriction on employees who accept employment with the contractor received favorable comments from six agencies, one employee organization, and one individual. However, one agency also cautioned that this change could result in fewer trained personnel being retained because some employees may not choose alternative Federal positions. Two individual commenters expressed strong disapproval of the change, one in terms of opposition to all contracting-out of Federal positions and the other in terms of possible conflicts of interest for contracted-out employees. We fail to see how this change would increase the possibility of conflict-of-interest problems in a contracting-out situation.

Finally, one commenter asked whether these rules would apply to employees whose agency's functions are taken over by a public corporation. That would depend on the terms of the contract and/or enabling legislation and whether the affected employees lost their status as Federal employees.

Comments on definitions. We received several comments about the definitions included in our proposed rulemaking. One agency suggested that the definition of "immediate annuity" be changed to reflect the fact that some months do not have 30 days. We have changed "30 days" to "1 month." (Note: The term "1 month" will be applied in a manner consistent with its use in other similar contexts. Generally, 1 month after any given date means the same date in the next succeeding month.) In addition, we have added a new paragraph to this definition to address the postponement of an annuity under 5 CFR 842.204(c).

One agency suggested that the definitions of "inefficiency" and "involuntary separation" might exclude some employees, such as those not under mobility agreements who are separated under 5 CFR part 752 for refusal to accept a directed reassignment outside the commuting area. Language has been added to the definition of "involuntary separation" to cover that exception. In response to a comment made by another agency, this language also makes the eligibility criteria for severance pay parallel to the guidance on eligibility for discontinued service retirement found in FPM Supplement 830-1, Chapter 44, which provides that a separation is not qualifying for discontinued service retirement if, after a mobility agreement has been established, an employee accepts one reassignment outside the commuting area, but subsequently declines another such reassignment. Under the final severance pay regulations, employees in this situation also are ineligible for severance pay.

Two agencies suggested that the definition of "involuntary separation" be modified to include separation from a time-limited appointment (that is otherwise a qualifying appointment) by reason of the normal expiration of that appointment. This point has been clarified through other changes in the definitions and in § 550.704(b)(3).

One individual pointed out that initial appointments with specific time limits, such as temporary and term appointments, should be explicitly included in the definition of "nonqualifying appointment." That oversight has been corrected. Three agencies commented favorably on the exclusion of excepted appointments "under Schedule C or an equivalent appointment made for similar purposes" from severance pay eligibility. Three agencies pointed out an inconsistency between paragraphs (d) and (g) of the proposed definition of "nonqualifying appointment." Paragraph (d) included an excepted appointment under Schedule C. Paragraph (g) included a "noncareer * * * appointment in the Senior Executive Service," unless it is effected within 3 calendar days after separation from a qualifying appointment. These agencies suggested that there should be no distinction between an excepted appointment under Schedule C and a noncareer appointment in the SES, since both generally involve duties of a confidential or policy determining character and neither is considered temporary. We agree. In addition, one agency suggested adding "unless it is effected within 3 calendar days after separation from a qualifying appointment" to paragraph (e) of this same definition. Paragraphs (c) through (h) of the proposed definition have been restructured to make these changes and to provide for easier readability.

Two agencies suggested a change in paragraph (b) of the definition of "qualifying appointment" to parallel paragraph (d) of the definition of "nonqualifying appointment." We have restructured and reordered paragraphs (b) through (g) of the definition of "qualifying appointment" to make this change and to parallel the changes made in the definition of "nonqualifying appointment." Another agency suggested a further explanation of "time-limited appointment" under paragraph (h) of this definition to make it clear that temporary promotions and details are excluded. Temporary promotions and details do not change the nature of an employee's appointment.

One agency suggested that the definition of "rate of basic pay" should be expanded to contain specific exclusions or inclusions of, for example, special salary rates established under 5 U.S.C. 5303. Such salary rates do constitute basic pay. However, we do not believe it would be practical to include an exhaustive list of specific inclusions and exclusions in the regulations themselves.

The new definition of "reasonable offer" received favorable comments from three agencies. One cited the difficulty of agreeing on what is an "equivalent position," and another stated that this new definition will help to retain experienced employees. One agency and two employee organizations opposed the change. The agency pointed out that severance pay and discontinued service retirement differ markedly in the amounts and durations of money paid out and therefore should not have the same eligibility criteria. The same agency also suggested that this change would result in the retention of more experienced employees at downgraded positions and would cause greater employee displacements throughout an agency in a RIF. We continue to believe it is reasonable to establish similar criteria for severance pay and discontinued service retirement, and we doubt that it is possible to anticipate accurately whether this rule would cause greater employee displacement in a RIF.

An employee organization opposed the definition of "reasonable offer," but was under the impression that the "reasonable offer" would be one made by the contractor. The "reasonable offer" is one made by the Federal employing agency for another Federal position. One agency suggested that "reasonable offer" be extended to one offered by the contractor. Defining what would constitute a "reasonable offer" by the contractor would be extremely difficult and inevitably would lead to disputes among affected parties. The same agency suggested that employees who refuse a reasonable offer by their agency and accept employment by the contractor be granted severance pay. The rationale offered for this is to ensure smoother transitions in contracting-out situations. The obvious costs and the loss of experienced personnel do not give this suggestion a reasonable basis for consideration.

Two agencies suggested a change in the definition of "representative rate" to include that of a prevailing rate position. That has been done.

Finally, one agency suggested that the definition of "severance pay fund" be changed to "severance pay." The term "severance pay fund" is used to make clear the difference between a single entitlement to severance pay based upon one qualifying separation and the lifetime entitlement of 1 year.

Other comments. One agency suggested that § 550.705(a) be revised to make it clear that all civilian service is creditable toward completing the requirement for 12 months of continuous employment, provided the employee is serving under a qualifying appointment at the time of separation. We have retained the original language to make it clear that a qualifying appointment of less than 12 months may be preceded by nonqualifying appointments creditable toward the 12-month requirement.

Four agencies objected to the requirement in section 550.713 that agencies maintain records of the number of employees receiving severance pay and the total amount of severance pay paid. Three agencies considered such a requirement burdensome. Some pointed out that there are no statistics before the change to use for comparison and that there is no practical way to ensure that the contractor will correctly report information to the agency about employees hired after the contract has been issued. We recognize that the information required by this regulation may be difficult to collect. Nevertheless, we believe it is important to maintain records concerning the payment of severance pay, especially in contracting-out situations. Agencies should make every effort to secure cooperation from private sector contractors.

Two agencies recommended that a reporting requirement be written into contracts to ensure the contractors' compliance. We have no objection to this being done. Two agencies recommended a time limit on retention of these records by the agencies. OPM will work with the National Archives and Records Administration to develop an appropriate records disposition schedule for this information. One agency recommended that the agencies' records also reflect how many employees continue in the contractors' employ during the following year in order to evaluate the effects of contracting-out on the employment experiences of "RIFed" employees. While we have no objection to the retention of this information by individual agencies, we do not believe it is necessary to require all agencies to do so.

The Department of Defense pointed out a potential conflict between the administration of its Priority Placement Program and continuing severance pay eligibility. However, there is no statutory authority to terminate

severance pay if a separated employee declines a reasonable offer under the Priority Placement Program. Legislation would be necessary to effect that change.

Finally, a number of editorial changes have been made in the final regulations to improve clarity and consistency.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities, since it applies only to Federal agencies and separated Federal employees.

List of Subjects in 5 CFR Part 550

Government employees and wages.

U.S. Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM is revising subpart G of part 550 of title 5, Code of Federal Regulations, to read as follows:

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart G—Severance Pay

Sec.

Authority: 5 U.S.C. 5595; E.O. 11257.

Subpart G—Severance Pay

§ 550.701 Introduction.

This subpart contains regulations of the Office of Personnel Management to implement the provisions of 5 U.S.C. 5595. These regulations authorize severance pay for employees who are involuntarily separated from Federal service and who meet other conditions of eligibility.

§ 550.702 Coverage.

Except as provided in 5 U.S.C. 5595(a)(2) (i) through (viii), this subpart applies to each full-time or part-time employee; that is, an employee with a regularly scheduled tour of duty who is serving under a qualifying appointment, as defined in § 550.703.

§ 550.703 Definitions.

In this subpart:

Agency means an agency as defined in 5 U.S.C. 5595(a)(1), except the government of the District of Columbia.

Commuting area means the geographic area that normally is considered one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities where people live and reasonably can be expected to travel back and forth daily to work.

Employee means an employee as defined in 5 U.S.C. 5595(a)(2), except an individual employed by the government of the District of Columbia.

Immediate annuity means—

(a) A recurring benefit payable under a Federal civilian or military retirement system that begins to accrue within 1 month after separation; or

(b) An annuity under § 842.204(a)(1) of this chapter for which the commencing date has been postponed under § 842.204(c) of this chapter.

Inefficiency means unacceptable performance or conduct that leads to a separation under part 432 or 752 of this chapter or an equivalent procedure.

Involuntary separation means a separation initiated by an agency against the employee's will and without his or her consent for reasons other than inefficiency, including a separation resulting from the expiration of a time-limited appointment effected within 3 calendar days after separation from a qualifying appointment. In addition, when an employee is separated because he or she declines to accept reassignment outside the commuting area, the separation is "involuntary" if the employee's position description or other written agreement does not provide for such a reassignment. However, an employee's separation is not "involuntary" if, after such a written mobility agreement is added, the employee accepts one reassignment outside the commuting area, but subsequently declines another such reassignment.

Nonqualifying appointment means an appointment with an intermittent work schedule, and the following appointments regardless of work schedule:

(a) A Presidential appointment;

(b) An emergency appointment;

(c) An excepted appointment under Schedule C or under a noncareer executive assignment under part 305 of this chapter; a noncareer appointment in the Senior Executive Service, as defined in 5 U.S.C. 3132(a); or an equivalent appointment made for similar purposes; and

(d) A time-limited appointment that is not made effective within 3 calendar days after separation from a qualifying appointment, including—

(1) A term appointment;

(2) A temporary appointment pending establishment of a register (TAPER);

(3) An overseas limited appointment with a time limitation;

(4) A limited term or limited emergency appointment in the Senior Executive Service, as defined in 5 U.S.C. 3132(a), or an equivalent appointment made for similar purposes; and

(5) A limited executive assignment under part 305 of this chapter or an equivalent appointment made for similar purposes.

Qualifying appointment means—

(a) A career or career-conditional appointment in the competitive service or the equivalent in the expected service;

(b) A career executive assignment under part 305 of this chapter;

(c) A career appointment in the Senior Executive Service;

(d) An excepted appointment without time limitation, except under Schedule C or under a noncareer executive assignment under part 305 of this chapter, or an equivalent appointment made for similar purposes;

(e) An overseas limited appointment without time limitation;

(f) A status quo appointment, including one that becomes indefinite when the employee is promoted, demoted, or reassigned;

(g) A time-limited appointment in the Foreign Service, when the employee was assigned under a statutory authority that carried entitlement to reemployment in the same agency, but this right of reemployment has expired; and

(h) A time-limited appointment that takes effect within 3 calendar days after the end of one or more of the qualifying appointments listed in paragraphs (a) through (g) of this definition.

Rate of basic pay means the rate of pay fixed by law or administrative action for the position held by an employee, including annual premium pay for standby duty under 5 U.S.C. 5545(c)(1) and night differential for prevailing rate employees under 5 U.S.C. 5343(f), but not including additional pay of any other kind.

Reasonable offer means the offer of a position that meets all the following conditions:

(a) The offer is in writing;

(b) The employee meets established qualification requirements; and

(c) The offered position is—

(1) In the employee's agency, including an agency to which the employee is transferred with his or her function in a transfer of functions between agencies;

(2) Within the employee's commuting area, unless geographic mobility is a condition of employment;

(3) Of the same tenure and work schedule (that is, part-time or full-time); and

(4) Not lower than two grade or pay levels below the employee's current grade or pay level, without consideration of grade or pay retention under part 536 of this chapter or other authority. In movements between pay schedules or pay systems, the representative rate of the offered position must not be lower than the representative rate of the grade or pay level that is two grades below the grade of the current position on the same pay schedule as the current position.

Representative rate has the meaning given that term in § 536.102 of this chapter.

Severance pay fund means the total severance pay to which an employee is entitled during a single entitlement under 5 U.S.C. 5595. It includes a basic severance pay allowance and, where applicable, an age adjustment allowance, as computed under § 550.707.

§ 550.704 Eligibility for severance pay.

(a) To be eligible for severance pay, an employee must:

(1) Be serving under a qualifying appointment;

(2) Have completed at least 12 months of continuous service, as described in § 550.705; and

(3) Be removed from Federal service by involuntary separation.

(b) An employee is not eligible for severance pay if he or she:

(1) Is serving under a nonqualifying appointment;

(2) Declines a reasonable offer;

(3) Is serving under a qualifying appointment in an agency scheduled by law or Executive order to be terminated within 1 year after the date of the appointment, unless on the date of separation, the agency's termination has been postponed to a date more than 1 year after the date of the appointment, or the appointment is effected within 3 calendar days after separation from a qualifying appointment;

(4) Is receiving injury compensation under subchapter I of chapter 81 of title 5, United States Code, unless the compensation is being received concurrently with pay or is the result of someone else's death; or

(5) Is eligible upon separation for an immediate annuity from a Federal civilian retirement system or from the uniformed services. Such an employee is ineligible even if all or part of the annuity is offset by payments from a non-Federal retirement system the employee elected instead of Federal civilian retirement benefits or disability benefits received from the Department of Veterans Affairs.

§ 550.705 Criteria for meeting the requirement for 12 months of continuous employment.

(a) The requirement for 12 months of continuous employment is met if, on the date of separation, an employee has held one or more civilian Federal positions over a period of 12 months without a single break in service of more than 3 calendar days. The positions held must have been under:

(1) One or more qualifying appointments; or

(2) One or more nonqualifying temporary appointments that precede the current qualifying appointment.

(b) When a break in service that is covered by severance pay interrupts otherwise continuous Federal employment, the entire period is considered continuous service.

(c) The period during which an employee receives continuation of pay or compensation for an injury on the job under chapter 81 of title 5, United States Code, is considered continuous Federal service.

§ 550.706 Criteria for meeting the requirement for involuntary separation.

(a) Employees who resign because they expect to be involuntarily separated are considered to have been involuntarily separated if they resign after receiving:

(1) Specific written notice that they will be involuntarily separated, and the notice of separation is not cancelled before the resignation is effected; or

(2) A general written notice of reduction in force or transfer of function that announces that all positions in the competitive area will be abolished or transferred to another commuting area.

(b) Except for resignations under the conditions described in paragraph (a) of this section, all resignations are voluntary separations and do not carry entitlement to severance pay.

§ 550.707 Computation of severance pay.

(a) *Basic severance pay allowance.* Except as provided in paragraph (b) of this section, the basic severance pay allowance consists of the following:

(1) One week of pay at the rate of basic pay for the position held by the employee at the time of separation for each full year of creditable service through 10 years;

(2) Two weeks of pay at the rate of basic pay for the position held by the employee at the time of separation for each full year of creditable service beyond 10 years; and

(3) Twenty-five percent of the otherwise applicable amount for each full 3 months of creditable service beyond the final full year.

(b) *Basic severance pay allowance for employees with variable work schedules or rates of pay.* The basic severance pay allowance is computed on the basis of the average rate of basic pay for the last position held during the 26 biweekly pay periods immediately preceding separation for an employee in a position:

(1) In which the work schedule regularly varies from full-time to part-time throughout the year;

(2) In which the rate of annual premium pay for standby duty varies throughout the year; or

(3) Under a prevailing rate schedule in which the work schedule regularly alternates between a day shift and a night shift throughout the year.

(c) *Age adjustment allowance.* The basic severance pay allowance is augmented by an age adjustment allowance consisting of 2.5 percent of the basic severance pay allowance for each full 3 months of age over 40 years.

§ 550.708 Creditable service.

The following types of service are creditable for computing an employee's severance pay under § 550.707:

(a) Civilian service performed by an employee;

(b) Service performed with the United States Postal Service or the Postal Rate Commission; and

(c) Military service, including active or inactive training with the National Guard, when performed by an employee who returns to civilian service through the exercise of a restoration right provided by law, Executive order, or regulation.

§ 550.709 Payment of severance pay.

(a) Each severance payment must be equal to the employee's rate of basic pay, less taxes and Medicare, and, when appropriate, contributions under the Federal Insurance Contributions Act (FICA). Payment must be made at the same pay period intervals salary would be paid if the employee were still employed. The final payment may be a partial payment consisting of that

portion of the severance pay fund remaining from the employee's immediate entitlement of the balance of the lifetime limitation of 1 year.

(b) When an employee receives severance pay as the result of separation from a qualifying temporary appointment (that is, a temporary appointment effected within 3 days after separation from a qualifying permanent appointment), severance pay shall be paid in an amount equal to the rate of basic pay received at the time of separation from the qualifying temporary appointment.

(c) When an employee is in a nonpay status immediately before separation, basic pay is the pay the employee would have received if he or she had been in a pay status when separated.

§ 550.710 Suspension of severance pay.

(a) When an individual receiving severance pay is given one or more nonqualifying temporary appointments, the severance pay is suspended on the day of the appointment. Severance pay begins again when the employee separates from the nonqualifying temporary appointment.

(b) When an individual who is eligible for severance pay is given a nonqualifying temporary appointment before severance payments begin, the severance payments do not begin until the employee is separated from the temporary appointment.

§ 550.711 Termination of severance pay entitlement.

Entitlement to severance pay ends when:

(a) An employee is appointed to the Federal Government under a qualifying appointment;

(b) The severance pay fund is exhausted; or

(c) The employee has received 1 year of severance pay.

§ 550.712 Reemployment; recredit of service.

(a) When a former employee is reemployed, the employing agency shall record on the appointment document the number of weeks of severance pay received (including partial weeks).

(b) If an employee again becomes entitled to severance pay, the agency in which entitlement arises shall recompute the severance pay allowance on the basis of all creditable service and current age and deduct from the number of weeks it would take to exhaust the allowance the number of weeks for which severance pay previously was received.

§ 550.713 Records.

Agencies shall maintain records, by fiscal year, of the number of employees who receive severance pay and the total amount of severance pay paid. When entitlement to severance pay arises as the result of contracting a Federal function to a private contractor, the affected agency also shall record the number of separated employees who go to work for the contractor within 90 days after the effective date of the contract. The Office of Personnel Management may require agencies to report such information to the Office.

[FR Doc. 90-4307 Filed 2-23-90; 8:45 am]
BILLING CODE 6325-01-M

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5 CFR Part 630

RIN 3206-AC47

Absence and Leave; Coverage of DC Government Employees

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is amending its leave regulations in 5 CFR part 630 to limit the coverage of employees of the government of the District of Columbia to individuals first employed by the DC government before October 1, 1987. This final rule conforms to the changes made by Public Law 99-335, June 6, 1986, in the statutory definition of "employee" for annual and sick leave category purposes.

EFFECTIVE DATE: This final rule becomes effective on March 28, 1990.

FOR FURTHER INFORMATION CONTACT: Frank Derby, (202) 632-5056.

SUPPLEMENTARY INFORMATION: On August 29, 1989, the Office of Personnel Management (OPM) published a proposed rule (54 FR 35654) to amend its leave regulations to reflect the new definition of "employee" contained in 5 U.S.C. 6301(2)(B), which limits coverage for employees of the DC government to individuals "first employed by the government of the District of Columbia before October 1, 1987." These amendments to the leave regulations clarify the coverage of the Federal annual and sick leave program with respect to current and former DC government employees. In addition, certain obsolete references to the U.S. Postal Service and the Regional Action Planning Commissions are removed.

Interested persons were invited to file comments through October 30, 1989. No comments were received. Therefore, this final rule adopts the August 29, 1989, proposed rule without change.

E.O. 12291, Federal Regulation

OPM has determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will affect only Federal employees and agencies.

List of Subjects in 5 CFR Part 630

Government employees.

Office of Personnel Management

Constance Berry Newman,

Director.

Accordingly, OPM is amending 5 CFR part 630 as follows:

PART 630—ABSENCE AND LEAVE

1. The authority citation for part 630 continues to read as follows:

Authority: 5 U.S.C. 6311; sec. 630.303 also issued under 5 U.S.C. 6133(a); sec. 630.501 and subpart F also issued under E.O. 11228; subpart G also issued under 5 U.S.C. 6305; subpart H issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332 and Public Law 100-566; subpart J also issued under 5 U.S.C. 6362 and Public Law 100-566.

2. In § 630.202, paragraph (b) is revised to read as follows:

§ 630.202 Full biweekly pay period; leave earnings.

* * * * *

(b) *Part-time employees.* Hours in a pay status in excess of an agency's basic working hours in a pay period are disregarded in computing the leave earnings of a part-time employee.

3. In § 630.502, paragraphs (b), (c), and (d)(1) are revised to read as follows:

§ 630.502 Sick leave recredit.

* * * * *

(b) Except as provided in paragraphs (c) and (d) of this section, an employee who is separated from the Federal Government or the government of the District of Columbia for other than retirement purposes is entitled to a recredit of sick leave if reemployed in the Federal Government within 3 years after separation is effected.

(c) An employee who is employed by the Appalachian Regional Commission established under 40 U.S.C. 101, App. A, within 4 calendar days after separation from the Federal Government is entitled to a recredit of sick leave if—

(1) Reemployed by the Federal Government within 6 months after separation from the Commission; and

(2) Employment with the Commission exceeded 2 years and 6 months without a break of more than 3 calendar days.

(d)(1) An employee who is separated from the Federal Government or the government of the District of Columbia to accompany a civilian or uniformed sponsor on official assignment to an overseas area is entitled to a recredit of sick leave within the time limit provided by paragraph (b) of this section or within no more than 2 years after he or she returns to the United States from an overseas area to which the sponsor was assigned, whichever is later, provided the individual—

(i) Was a family member of a Federal civilian employee or a member of a uniformed service who was assigned to an overseas area; and

(ii) Accompanied the civilian employee or uniformed sponsor on official assignment in the overseas area during the 3-year period specified in paragraph (b) of this section.

* * * * *

[FR Doc. 90-4308 Filed 2-23-90; 8:45 am]
BILLING CODE 6325-01-M

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5 CFR Part 844

RIN 3206-AD61

Federal Employees' Retirement System—Disability Retirement

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final rules on disability retirement under the Federal Employees' Retirement System Act of 1986. These rules establish the requirements for eligibility to receive a disability annuity, application procedures for disability annuities, the methodology for computing a disability annuity, and the conditions and procedures under which a disability annuity is terminated and reinstated.

EFFECTIVE DATES: Sections 844.401, 844.403, and 844.405 are effective January 8, 1988, and apply to annuitants who become reemployed on or after that date; the remainder of these final rules take effect on January 1, 1987.

FOR FURTHER INFORMATION CONTACT: H.T. Newland, (202) 632-4682.

SUPPLEMENTARY INFORMATION: On August 31, 1988, OPM published (53 FR 33433) interim rules and requested comments on those rules to implement the disability retirement provisions of the FERS Act of 1986. We received six written comments on the interim regulations. In addition, Public Law 100-238 made several significant changes which were all retroactive to January 1, 1987, the date that the Federal Employees' Retirement System was established.

Agency Comments

Two of these comments, as well as virtually all of the telephone comments and inquiries we received, noted that major portions of the interim rules did not appear to reflect the provisions of the FERS Act, as amended by Public Law 100-238 (101 Stat. 1744, January 8, 1988), which made technical corrections relating to FERS. Although OPM was aware of the changes enacted by Public Law 100-238, complications that were beyond OPM's control prevented us from revising the interim regulations to include these technical amendments before the regulations were published. We regret any confusion caused by the discrepancies between the interim regulations and the pertinent provisions of Public Law 100-238. The final rules do incorporate these changes, which are described below.

Another written comment we received was submitted by a Federal agency. The agency expressed concern about delays in processing disability retirement applications that it believed would occur while the applicant waits for the Social Security Administration to process the individual's application for social security disability benefits.

However, under current OPM procedures, the processing of a FERS disability retirement application is not delayed pending action by the Social Security Administration on the individual's application for a social security disability insurance benefit. As long as OPM has the individual's receipt showing that he or she has applied for social security benefits, we proceed with processing the FERS application. If we approve the application, we begin interim payments (if the employee is in a non-pay status) and ask the agency to separate the employee and forward the final retirement records to OPM. These interim payments, like those paid under the Civil Service Retirement System, are estimates computed to approximate, but not exceed, the annuity to which the individual will ultimately be entitled.

Upon receipt of final records, we begin paying the actual FERS annuity and adjust it when the individual becomes entitled to receive monthly social security benefits. (Generally, the social security disability benefits may not begin until five months have passed since the apparent onset of the individual's disability.)

If five months have already passed before we receive the individual's final retirement records, we still make interim payments to prevent financial hardship. When the Social Security Administration (SSA) informs us of the amount, if any, of the individual's social security benefit (or the annuitant provides a copy of the SSA award statement, subject to later verification), we authorize the actual annuity benefit.

The same agency also recommends that agencies be required to attempt reassignment of a FERS disability applicant rather than merely consider the applicant for reassignment. This is a matter, however, in which we lack administrative discretion. The FERS statute (5 U.S.C. 8451(a)(2)(B)) requires only that agencies consider disability applicants for reassignment. It does not require agencies to make an offer of reassignment.

Finally, the commenting agency questioned agencies' ability to obtain from the Social Security Administration information about an employee's entitlement to social security disability benefits in connection with an agency-filed disability retirement application under FERS. The Social Security Administration has assured us that it will accept agency-filed applications for social security disability benefits on behalf of employees. However, SSA procedures would require notifying the employee that an application has been filed on his or her behalf, and giving the employee 10 days to protest the application. The application could not be processed by SSA if the employee objected.

The fourth set of written comments we received recommended that "each situation described in the * * * regulations" be illustrated with examples, and that the "computation methodology be presented in formula rather than narrative form." We believe that, particularly after the changes made by Public Law 100-238 have been incorporated, the computation will have been sufficiently simplified so that it will be understandable. Moreover, we do not believe the computation provisions, particularly those governing the recomputation at age 62, lend themselves to expression as a formula. What happens to a disability benefit when the recipient reaches age 62 can be described only in narrative form. However, a Federal agency requested that we publish FPM material that includes examples of computations and recomputations, and we plan to do so.

Another Federal agency suggested that "civilian service" be defined in the regulations to clarify that service performed before 1989 that would have been creditable under CSRS is also

creditable for purposes of meeting the 18-month service requirement to qualify for FERS disability benefits. We believe a reference to the detailed definition of creditable civilian service in 5 CFR 842.304 is preferable, and we have added such a reference to § 844.103 of these final rules on disability retirement.

The same agency expressed skepticism about the requirement in § 844.203(b) of the interim rules that an application for FERS disability benefits will be dismissed, or payments will be terminated, if the applicant or annuitant refuses a medical examination offered by OPM. The agency believes that, in cases of "mental" disability, the refusal to comply with a request to be examined may in itself be a symptom of the disease. While OPM shares agencies' concerns about such cases, we simply cannot pay disability benefits if there is no medical documentation on which to base a determination that the individual is disabled. In any event, a recent court case, *French* v. *OPM*, has resulted in both OPM and the Merit Systems Protection Board taking a more active role in ensuring that such individuals have adequate legal representation before a final decision can be made in their cases.

This agency also misunderstood the application of the offset in FERS disability benefits to account for the individual's receipt of social security disability benefits, as set forth in our interim regulations. Section 844.302 of the interim regulations specifies that, although the amount of an individual's "assumed social security disability benefit" is determined without regard to the 5-month waiting period under Social Security (i.e., as though the individual began receiving social security disability benefits on the same day that he or she began receiving a FERS disability annuity), the timing of the offset of the FERS annuity by the "assumed social security disability benefit" is tied to the date the individual actually becomes entitled to receive social security disability benefits. In other words, the reduction does not begin before the individual begins receiving social security disability benefits.

In any event, this should no longer be a point of confusion, since Public Law 100–238, as described below, amended the statutory provisions governing this offset. These amendments provide that the amount, as well as the timing, of the offset will be based on the date the individual first becomes entitled to receive benefits under Social Security.

We also received a request to define "average pay" for purposes of computing FERS disability annuities. However, since 5 U.S.C. 8401(3) clearly defines "average pay" under FERS as the largest annual rate derived from averaging an employee's rates of basic pay in effect over 3 consecutive years (or over the total service, in the case of an annuity based on less than 3 years of service), we do not believe it is necessary to simply repeat this definition in the regulations.

Changes Required To Conform to Public Law 100–238

Elimination of "Assumed Social Security Disability Benefit"

As noted above, we have determined that several changes needed to be made in the interim rules, primarily because of amendments enacted by Public Law 100–238. For example, these amendments eliminated the use of the "assumed" social security disability benefit as the amount by which the FERS disability annuity must be reduced. This "assumed" benefit amount was defined under the original FERS Act as the amount of the social security disability benefit to which the individual would have been entitled if his or her social security benefit had begun at the same time that the FERS disability annuity began (i.e., assuming the 5-month waiting period required under the Social Security Act did not exist), adjusted by FERS cost-of-living increases effective after the commencing date of the FERS annuity. This "assumed" social security benefit would often have differed from the actual social security benefit payable to the individual, because the Social Security Act provides for a 5-month waiting period between the onset of disability and the start of the social security disability benefit. FERS does not have this 5-month waiting period.

Instead of this "assumed" social security benefit amount, the amendments made by Public Law 100–238 now require the use of the actual social security benefit to which the individual is entitled, if any, as the amount by which the FERS annuity must be reduced. However, the statute still refers to this amount as the "assumed" social security disability benefit because it is continually updated by all FERS cost-of-living adjustments (COLA's) effective after the first year the individual has been receiving FERS disability annuity payments. Therefore, after one year of annuity payments, the "assumed" social security disability benefit will not be the same as the actual amount the individual is receiving from Social Security, since the former will be updated by FERS COLA's, while the latter will be increased by Social Security COLA's.

We are aware that many agencies and employees have found the use of the term "assumed" in this context to be confusing. Therefore, even though the FERS Act, as amended, retains this term, we are labelling this amount the "adjusted social security disability benefit" in the final regulations. We believe the term "adjusted" characterizes the amount in question more accurately than the term "assumed." We hope those who must work with these regulations will find the former term at least slightly less confusing than the latter.

Recomputation of FERS Disability Annuities at Age 62

Another important change made by Public Law 100–238 concerns the recomputation of a FERS disability annuity when the annuitant reaches age 62. The interim regulations provided that, after the annuitant's 62nd birthday, the annuity payable would be the lesser of two amounts. One of these amounts was to be the amount of a non-disability annuity based on the individual's service, including credit for the period during which the individual was receiving a disability annuity, and using a "high-three" average salary that was increased by all FERS cost-of-living adjustments that took effect while the individual was receiving the disability annuity. The second of the two amounts being compared was to be the amount the individual had been receiving immediately before his or her 62nd birthday (either 60 percent or 40 percent of average pay), with a reduction by either 100 percent or 60 percent, as appropriate, of the "assumed" social security disability benefit. Even if the individual had not been entitled to any social security benefit, this reduction was to be imposed at age 62 for purposes of determining the amount of annuity payable after the annuitant's 62nd birthday.

Under the amendments enacted by Public Law 100–238, however, all FERS disability annuities will be recomputed at age 62 according to the first method described above. That is, in all cases, when a disability annuitant reaches age 62, his or her annuity will be recomputed as though the individual had not become disabled, but had continued working until age 62. The disability benefit will be converted to a non-disability benefit, and will include credit for all periods during which the individual was receiving a FERS disability annuity. For purposes of this computation, the individual's average salary will be increased by all FERS cost-of-living

adjustments that took effect while he or she was receiving a disability annuity.

This recomputation will apply to all FERS disability annuitants, including those who, before age 62, had their annuities computed under the non-disability computation provisions, as required by §§ 844.303 and 844.304, either because they had already met the age and service requirements for normal retirement at the time they became disabled, or because their "earned" annuity based on their actual service was greater than the disability computation. The recomputation of disability annuities at age 62 is based on the assumption that, if the individual had not become disabled, he or she would have continued working until age 62. This assumption must be applied equally to all disability annuitants.

Changes in Provisions Governing Reemployment of Annuitants

The original FERS Act required all annuities to terminate when the retiree became reemployed in any position in the Federal Government. However, Public Law 100–238 amended these provisions along the lines of the Civil Service Retirement System provisions governing reemployment of annuitants. This means that, generally, upon reemployment in the Federal Government, a FERS annuitant will continue to receive annuity, while his or her pay in the new position will be reduced by the amount of annuity.

This change made it necessary for us to revise §§ 844.401 and 844.403, governing recovery from disability and reemployment of disability annuitants, respectively, to parallel the corresponding provisions of the Civil Service Retirement System regulations. Sections 844.401 and 844.403 now provide for determinations by OPM that Federal reemployment constitutes evidence of a disability annuitant's recovery from disability. Section 844.403 also requires an agency to reduce a disability retiree's pay during reemployment by the amount of annuity when reemployment does not demonstrate recovery.

Basically, a disability retiree's annuity continues during reemployment unless OPM determines that the annuitant has recovered or been restored to earning capacity. If OPM makes such a determination and later finds that the disability has recurred or that the individual has again lost earning capacity, OPM generally must reinstate the annuity at 60 percent of average salary for the first year following reinstatement, and at 40 percent of average salary thereafter.

Changes Regarding Concurrent Entitlement to Annuity and Workers' Compensation Benefits

Public Law 100–238 also amended the statutory provisions barring concurrent receipt of a FERS or CSRS annuity and injury compensation payments from the Department of Labor. These amendments clarify that an individual is not entitled to receive both a workers' compensation benefit under chapter 81 of title 5, United States Code, and any concurrent FERS annuity based on the same service. This prohibition also applies to commuted lump-sum benefits under section 8135 of title 5. Formerly, the law provided that an individual could receive such a lump-sum benefit and a FERS annuity as long as the latter was not based on the same disability as the workers' compensation benefit. Now, the law clearly bars concurrent payment of a lump-sum compensation benefit and a FERS annuity based on the same individual's service. Section 844.105 of the regulations has been revised accordingly.

Other Changes

Military Reserve Technicians

The FERS Act provides "disability" annuities for military reserve technicians who are not disabled as defined by the FERS Act, but who, because of a medical problem, lose the military status they are required to maintain in order to remain in their technician positions. The law requires the annuity of such an individual to terminate upon reemployment in the Federal Government or when the individual declines an offer of reemployment in a position in the same commuting area and at the same grade or pay level as the position from which he or she retired. We have amended § 844.403 to reflect this provision.

Medical Documentation From State-Licensed Practitioners

We have amended the definition of "medical documentation" to reflect that, in addition to documentation from licensed physicians, OPM will consider evidence submitted by State-licensed practitioners, such as clinical psychologists, in making determinations regarding an individual's entitlement to disability retirement benefits under FERS. This change conforms to the current part 339 regulations on medical qualification determinations.

Post-Retirement Examination Requirement

For clarity, a reference to the statutory requirement concerning post-retirement examination of disability retirees whose disability is not permanent in character has been added to § 844.401.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation will affect only disability retirement benefits for Federal employees.

List of Subjects in 5 CFR Part 844

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Constance B. Newman,

Director.

Accordingly, OPM is revising part 844 of title 5, Code of Federal Regulations, to read as follows:

PART 844—FEDERAL EMPLOYEES' RETIREMENT SYSTEM—DISABILITY RETIREMENT

Subpart A—General Provisions

Subpart B—Applications for Disability Retirement

Subpart C—Computation of Disability Annuity

Subpart D—Termination and Reinstatement of Disability Annuity

Authority: 5 U.S.C. 8461.

Subpart A—General Provisions

§ 844.101 Purpose.

This part establishes the requirements under the Federal Employees' Retirement System (FERS) for eligibility to receive a disability annuity, application procedures for disability annuities, rules for computing a disability annuity, and the conditions and procedures under which a disability annuity is terminated and reinstated.

§ 844.102 Definitions.

In this part:

Accommodation means a reasonable adjustment made to an employee's job or work environment that enables the employee to perform the duties of the position. Accommodation may include modifying the worksite; adjusting the work schedule; restructuring the job; obtaining or modifying equipment or devices; providing interpreters, readers, or personal assistants; and retraining the employee.

Basic pay means the pay an employee receives that is subject to deductions under FERS.

Commuting area has the meaning given the term "local commuting area" in § 351.203 of this chapter.

Disabled and *disability* means unable or inability, because of disease or injury, to render useful and efficient service in the employee's current position.

FERS means the Federal Employees' Retirement System established under chapter 84 of title 5, United States Code.

Medical condition means a health impairment resulting from a disease or injury, including a psychiatric disease. This is the same definition of "medical condition" that is found in § 339.104 of this chapter.

Medical documentation means a statement from a licensed physician, which may be supplemented by a statement from another appropriate practitioner, that provides information OPM considers necessary to determine an individual's entitlement to benefits under this part. Such a statement must meet the criteria set forth in § 339.104 of this chapter.

Military reserve technician has the same meaning given this term in 5 U.S.C. 8401(30).

OPM means the Office of Personnel Management.

Permanent position means an appointment without time limitation.

Physician and *practitioner* have the same meaning given these terms in § 339.104 of this chapter.

Qualified for reassignment means able to meet the minimum requirements for the grade and series of the vacant position in question.

Same grade or pay level means, in regard to a vacant position within the same pay as the position the employee currently occupies, the same grade and an equivalent amount of basic pay. A position under a different pay system or schedule is at the same pay level if the representative rate, as defined in § 532.401 of this chapter, equals the representative rate of the employee's current position.

Useful and efficient service means acceptable performance of the critical or essential elements of the position; and satisfactory conduct and attendance.

Vacant position means an unoccupied position of the same grade or pay level and tenure for which the employee is qualified for reassignment that is located in the same commuting area and, except in the case of a military reserve technician, is serviced by the same appointing authority of the employing agency. The vacant position must be full time, unless the employee's current position is less than full time, in which case the vacant position must have a work schedule of no less time than that of the current position. In the case of an employee of the United States Postal Service, a vacant position does not include a position in a different craft or a position to which reassignment would be inconsistent with the terms of a collective bargaining agreement covering the employee.

§ 844.103 Eligibility.

(a) Except as provided in paragraph (c) of this section, an individual must meet the following requirements in order to receive a disability annuity:

(1) The individual must have completed at least 18 months of civilian service that is creditable under FERS, as defined in § 842.304 of this chapter;

(2) The individual must, while employed in a position subject to FERS, have become disabled because of a medical condition, resulting in a deficiency in performance, conduct, or attendance, or if there is no such deficiency, the disabling medical condition must be incompatible with either useful and efficient service or retention in the position;

(3) The disabing medical condition must be expected to continue for at least 1 year from the date the application for disability retirement is filed;

(4) Accommodation of the disabling medical condition in the position held must be unreasonable; and

(5) The individual must not have declined an offer of reassignment to a vacant position.

(b) The employing agency must consider a disability applicant for reassignment to any vacant position. The agency must certify to the Office of Personnel Management (OPM) either that there is no vacant position or that, although it made no offer of reassignment, it considered the individual for a vacant position. If an agency offers a reassignment and the individual declines the offer, the individual may appeal the agency's determination that the individual is not disabled for the position in question to the Merit Systems Protection Board under 5 U.S.C. 7701.

(c)(1) Paragraphs (a)(2) through (a)(4) of this section do not apply to a military reserve technician who retires under 5 U.S.C. 8456.

(2) An individual who separates from employment as a military reserve technician under circumstances set forth in 5 U.S.C. 8456(a)(1) after reaching age 50 and completing 25 years of service is not entitled to a disability annuity under this part, but is entitled to an annuity under § 842.210 of this chapter.

(3) A former military reserve technician is not entitled to an annuity under 5 U.S.C. 8456 based on service as a technician if the technician is subsequently appointed to another position in the Federal Government.

§ 844.104 Administrative review of OPM decisions.

Any individual whose rights or interests under FERS are affected by an initial decision of OPM may request OPM to review its decision under § 841.306.

§ 844.105 Relationship to workers' compensation.

(a) Except as provided in paragraph (b) of this section, an individual who is eligible for both an annuity under part 842 or 844 of this chapter and compensation for injury or disability under subchapter I of chapter 81 of title 5, United States Code (other than a scheduled award under 5 U.S.C. 8107(c)), covering the same period of time must elect to receive either the annuity or compensation.

(b) Notwithstanding the provisions of paragraph (a) of this section, an individual may concurrently receive an annuity based on the individual's service under part 842 or 844 of this chapter and a benefit under subchapter I of chapter 81 of title 5, United States Code, on account of the death of another individual. An individual may also receive an annuity under part 843 of this chapter and compensation for injury or disability to himself or herself under

such subchapter I covering the same period of time

(c) An individual who elects to receive compensation payments under paragraph (a) of this section and who has not received a refund of contributions under § 843.202 retains the right to elect to receive an annuity under part 842 or 844, as the case may be, in the event that the individual's compensation payments cease or are reduced

Subpart B—Applications for Disability Retirement

§ 844.201 General requirements.

(a)(1) An application for disability retirement must be filed, on a form prescribed by the Office of Personnel Management (OPM), with the employing agency before the employee or Member separates from service or with OPM within 1 year thereafter. A separated employee who submits an application to the former employing agency, rather than with OPM, will meet the filing deadline only if OPM receives the application from the agency within 1 year after the separation.

(2) OPM may waive the 1-year time limit if the employee or Member was mentally incompetent on the date of separation or within 1 year thereafter, in which case OPM must receive the application from the individual or his or her representative within 1 year after the date the individual regains competency or a court appoints a fiduciary, whichever is earlier.

(b)(1) Before payment of a disability annuity under this part can be authorized, the applicant must provide OPM with:

(i) Satisfactory evidence that the applicant has filed an application for disability insurance benefits under section 223 of the Social Security Act; or

(ii) An official statement from the Social Security Administration that the individual is not insured for disability insurance benefits as defined in section 223(c)(1) of the Social Security Act.

(2) A disability retirement application under this part will be dismissed when OPM is notified by the Social Security Administration that the application referred to in paragraph (b)(1)(i) of this section has been withdrawn. All rights to an annuity under this part terminate upon withdrawal of an application for social security disability benefits.

(c) An application for disability retirement will not preclude or delay any other appropriate personnel action by the employing agency.

§ 844.202 Agency-filed disability retirement applications.

(a) *Basis for filing an application for an employee.* An agency must file an application for disability retirement of an employee who has 18 months of Federal civilian service when all of the following conditions are met:

(1) The agency has issued a decision to remove the employee;

(2) The agency concludes, after its review of medical documentation, that the cause for unacceptable performance, attendance, or conduct is disease or injury;

(3) The employee is institutionalized, or the agency concludes, based on a review of medical and other information, that the employee is incapable of making a decision to file an application for disability retirement;

(4) The employee has no personal representative or guardian; and

(5) The employee has no immediate family member who is willing to file an application on his or her behalf.

(b) *Agency procedures.* (1) When an agency issues a decision to remove an employee and not all of the conditions described in paragraph (a) of this section have been satisfied, but the removal is based on reasons apparently caused by a medical condition, the agency must advise the employee in writing of his or her possible eligibility for disability retirement and of the time limit for filing an application.

(2) If all of the conditions described in paragraph (a) of this section have been met, the agency must inform the employee in writing at the same time it informs the employee of its removal decision, or at any time before the separation is effected, that:

(i) The agency is submitting a disability retirement application on the employee's behalf to OPM;

(ii) The employee may review any medical information in accordance with § 294.106(d) of this chapter; and

(iii) The action does not affect the employee's right to submit a voluntary application for disability retirement or any other retirement benefit to which the employee is entitled under FERS.

(3) When an agency submits an application for disability retirement to OPM on behalf of an employee, it must provide OPM with copies of the decision to remove the employee, the medical documentation, and any other documents needed to show that the cause for removal results from a medical condition. Following separation, the agency must provide OPM with a copy of the documentation of the separation.

(c) *OPM procedures.* (1) OPM will not act on any application for disability retirement filed by an agency on behalf of an employee until it receives the appropriate documentation of the separation. When OPM receives a complete application for disability retirement under this section, it will notify the former employee that it has received the application and that he or she may submit medical documentation. OPM will determine entitlement to disability benefits under § 844.203.

(2) OPM will cancel any disability retirement when a final decision of an administrative authority or court reverses the removal action and orders the reinstatement of an employee to the agency rolls.

§ 844.203 Supporting documentation.

(a) An individual or agency filing an application for disability retirement is responsible for providing OPM with the evidence described in § 844.201(b)(1), as well as whatever documentation OPM requires in order to determine whether the individual meets the eligibility requirements set forth in § 844.103. The documentation must be provided in a form prescribed by OPM. Failure to sumbit the documentation required is grounds for dismissing the application. It is also the responsibility of the disability annuitant to obtain and submit evidence OPM requires to show continuing entitlement to disability benefits. Unless OPM orders an examination by a physician of its choice under paragraph (b) of this section, the cost of providing medical documentation rests with the applicant or disability annuitant.

(b) OPM may offer the applicant a medical examination when it determines that an independent evaluation of medical evidence is needed in order to make a decision regarding an application for a disability annuity or a disability annuitant's entitlement to continuing benefits. The medical examination will be conducted by a medical officer of the United States or a qualified physician or board of physicians designated by OPM. The applicant's refusal to submit to an examination is grounds for dismissal of the application or termination of payments to an annuitant.

(c)(1) OPM will review the documentation submitted under paragraph (a) of this section to determine whether the individual has met the eligibility requirements set forth in § 844.103. OPM will issue its decision in writing to the individual and to the employing agency. The decision will include a statement of OPM's findings and conclusions and an explanation of the applicant's right to request reconsideration or MSPB review under § 844.104.

(2) OPM may rescind a decision to allow an application for disability retirement at any time if OPM determines that the original decision was erroneous due to fraud, misstatement of fact, or upon the acquisition of additional medical or other documentation. OPM will provide the individual and the employing agency with written notification of the rescission, including a statement of OPM's findings and conclusions and an explanation of the individual's right to request reconsideration or MSPB review under § 844.104.

(d) Subject to 5 U.S.C. 552a, any supporting documentation provided to OPM under this section may be shared with the Social Security Administration and the Office of Workers' Compensation Programs of the U.S. Department of Labor.

Subpart C—Computation of Disability Annuity

§ 844.301 Commencing date of disability annuity.

A disability annuity under this part commences on the day after the employee separates or the day after pay ceases and the employee meets the requirements for title to an annuity.

§ 844.302 Computation of disability annuity before age 62.

(a) For the purposes of this subpart, the "adjusted social security disability benefit" is the benefit to which an annuitant is entitled under section 223 of the Social Security Act:

(1) For the month in which the annuity under this part commences, or is reinstated under § 844.405, or, if later, the first month for which the annuitant is entitled to both an annuity under this part and a social security disability benefit;

(2) Including, where appropriate, a reduction under section 224 of the Social Security Act, based on the amount of the disability annuity under this subpart without regard to paragraphs (b)(2) and (c)(2) of this section; and

(3) Adjusted by each cost-of-living increase effective under 5 U.S.C. 8462(b) beginning with the later of the month after the 12-month period referred to in paragraph (b)(1) of this section, or the first month for which the annuitant is entitled to both an annuity under this part and a social security disability benefit.

(b)(1) Except as otherwise provided in this part, the annuity payable under this subpart until the end of the 12th month beginning after the annuity commences (or is reinstated under § 844.405) is equal to 60 percent of the annuitant's average pay.

(2) For months for which the annuitant is also entitled to a social security disability benefit, the amount computed under paragraph (b)(1) of this section is reduced by 100 percent of the annuitant's adjusted social security disability benefit.

(c)(1) Except as otherwise provided in this part, the annuity under this subpart after the period described in paragraph (b)(1) of this section is equal to 40 percent of the annuitant's average pay.

(2) For months after the period described in paragraph (b)(1) of this section for which the annuitant is also entitled to a social security disability benefit, the amount computed under paragraph (c)(1) of this section is reduced by 60 percent of the annuitant's adjusted social security disability benefit.

(d) For months in which an annuity is reduced under paragraph (b) or (c) of this section, any reduction for survivor benefits is made after the reduction for social security benefits.

§ 844.303 Minimum disability annuity.

Notwithstanding any other provision of this part, an annuity payable under this part cannot be less than the amount of an annuity computed under 5 U.S.C. 8415 (excluding subsection (f) of that section) based on the annuitant's service.

§ 844.304 Computation of disability annuity for those otherwise eligible to retire.

(a) An individual retiring under this part is not entitled to elect to receive an alternative form of annuity under 5 U.S.C. 8420a, even if the individual meets the requirements for retirement under another part and would be entitled to elect an alternative form of annuity in connection therewith.

(b) Notwithstanding any other provision of this part, an annuity payable under this part will be computed under 5 U.S.C. 8415 if it commences or is reinstated under § 844.405 (b) or (c) of this part on or after:

(1) The annuitant has satisfied the age and service requirements for retirement under 5 U.S.C. 8412 (a) through (f); or

(2) The annuitant has reached age 62.

§ 844.305 Redetermination of disability annuity at age 62.

Effective on and after the annuitant's 62nd birthday, the rate of annuity payable to a disability annuitant will be the amount of an annuity computed with respect to the annuitant under 5 U.S.C. 8415 (including subsection (g) of that section), including credit for all periods before the annuitant's 62nd birthday during which he or she was entitled to an annuity under this part. The average pay used in computing the annuity under 5 U.S.C. 8415 is adjusted by all cost-of-living increases effective under 5 U.S.C. 8462(b) during the period the annuitant was receiving the disability annuity under this part.

Subpart D—Termination and Reinstatement of Disability Annuity

§ 844.401 Recovery from disability.

(a) Each annuitant receiving disability annuity from the Fund shall be examined under the direction of OPM at the end of one year from the date of disability retirement and annually thereafter until the annuitant becomes 60 years of age unless the disability is found by OPM to be permanent in character. OPM may order a medical or other examination at any time to determine the facts relative to the nature and degree of disability of the annuitant. Failure to submit to reexamination shall result in suspension of annuity.

(b) A disability annuitant may request medical reevaluation under the provisions of this section at any time. OPM may reevaluate the medical condition of disability annuitants age 60 or over only on their own request.

(c) *Recovery based on medical or other documentation.* When OPM determines on the basis of medical documentation or other evidence that a disability annuitant has recovered from the disability, OPM will terminate the annuity effective on the first day of the month beginning 1 year after the date of the medical documentation or other evidence showing recovery. If an agency reemploys a disability annuitant who has been found recovered at any grade or rate of pay within the 1-year period pending termination of the disability annuity under this paragraph, OPM will terminate the annuity effective on the date of reemployment.

(d) *Recovery based on reemployment by the Federal Government.* Reemployment by an agency at any time before age 60 is evidence of recovery if the reemployment is under an appointment not limited to a year or less, at the same or higher grade or pay level as the position from which the disability annuitant retired. The new position must be full-time unless the position the disability annuitant occupied immediately before retirement was less than full-time, in which case the new position must have a work schedule of no less time than that of the position from which the disability

annuitant retired. In this instance, OPM needs no medical documentation to find the annuitant recovered. Disability annuity payments will terminate effective on the first day of the month following the month in which the recovery finding is made under this paragraph.

§ 844.402 Restoration of earning capacity.

(a) *Earning capacity determinations.* If a disability annuitant is under age 60 on December 31 of any calendar year and his or her income from wages or self-employment or both during that calendar year equals at least 80 percent of the current rate of basic pay of the position occupied immediately before retirement, the annuitant's earning capacity is considered to be restored The disability annuity will terminate on the June 30 after the end of the calendar year in which earning capacity is restored.

(b) *Current rate of basic pay for the position occupied immediately before retirement.* (1) A disability annuitant's income for a calendar year is compared to the gross annual rate of basic pay in effect on December 31 of that year for the position occupied immediately before retirement. The income limitation for most disability annuitants is based on the rate for the grade and step that reflects the total amount of basic pay (both the grade and step and any additional basic pay) in effect on the date of separation from the agency for disability retirement. Additional basic pay is included subject to the premium pay restrictions of 5 U.S.C. 5545 (c)(1) and (c)(2).

(2) In the case of an annuitant whose basic pay rate on the date determined under paragraph (b)(1) of this section did not match a specific grade and step in the pay schedule:

(i) For those retiring from a Senior Executive Service position, a merit pay position, a position for which a special pay rate is authorized (except as provided in paragraph (b)(2)(ii) of this section), or any other position in which the rate of basic pay is not equal to a grade and step in a pay schedule, the grade and step will be established for this purpose at the lowest step in the pay schedule grade that is equal to or greater than the actual rate of basic pay payable.

(ii) For those retiring with a retained rate of basic pay or from a position for which a special pay rate is in effect but whose rate of basic pay exceeds the highest rate payable in the pay schedule grade applicable to the position held, the grade is established for this purpose at the highest grade in the schedule that is closest to the grade of the position held and within which the amount of the retained pay falls. The step is established for this purpose at the lowest step in that grade that equals or exceeds the actual rate of pay payable.

(3) For annuitants retiring from the United States Postal Service, only cost-of-living allowances subject to FERS deductions are included in determining the current rate of basic pay of the position held at retirement.

(c) *Income.* (1) Earning capacity for the purposes of this section is demonstrated by an annuitant's ability to earn post-retirement income in exchange for personal services or a work product, or as a profit from one or more businesses wholly or partly owned by the disability annuitant and in the management of which the annuitant has an active role. Income for the purposes of this section is not necessarily the same as income for the purposes of the Internal Revenue Code.

(2) Income earned from one source is not offset by losses from another source. Income earned as wages is not reduced by a net loss from self-employment. The net income from each self-employment endeavor is calculated separately, and the income earned as net earnings from one self-employment endeavor is not reduced by a net loss from another self-employment endeavor. Thus, a net loss from one endeavor is considered to be a net income of zero, and the net incomes from each separate self-employment endeavor are added together to determine the total amount of income from self-employment for a calendar year.

(3) Income is counted in the calendar year in which it is earned, even though receipt may be deferred.

(d) *Requirement to report income.* All disability annuitants who, on December 31 of any calendar year, are under age 60 must report to OPM their income from wages or self-employment or both for that calendar year. Each year as early as possible, OPM will send a form to annuitants to use in reporting their income from the previous calendar year. The form specifies the date by which OPM must receive the report. OPM will determine entitlement to continued annuity on the basis of the report. If an annuitant fails to submit the report, OPM may stop annuity payments until it receives the report.

§ 844.403 Reemployment of disability annuitants.

(a) An agency may reemploy a disability annuitant in any position for which he or she is qualified. The employing agency must notify OPM of the reemployment, including in the notification the nature of the position, the type of appointment, any applicable medical standards, and the rate of basic pay. The employing agency must give OPM similar notification when:

(1) A reemployed disability annuitant is converted from a temporary to a term or permanent appointment, from a term appointment to a permanent appointment, or from a part-time to a full-time tour-of-duty; and

(2) A reemployed disability annuitant with a permanent appointment is promoted to a position at the same grade or pay level as that held at retirement.

(b) When a disability annuitant whom OPM has found recovered from disability or restored to earning capacity is reemployed while still entitled to disability annuity, OPM will terminate the annuity effective on the date of reemployment.

(c) When a disability annuitant who has not been found recovered from disability or restored to earning capacity is reemployed, the employing agency must offset the pay of the disability annuitant by the amount of annuity allocable to the period of reemployment.

(d) OPM may review the notification of reemployment and order a reevaluation as it finds appropriate. The employing agency and/or the employee may submit medical documentation in connection with the reevaluation

(e) When a reemployed disability annuitant is found recovered from disability, OPM will terminate the annuity effective on the first day of the month following the month in which the recovery or restoration finding is made, notify the agency of its finding, and instruct the agency to cease reducing pay by the amount of annuity allocable to the period of employment.

(f) *Military reserve technicians.* A disability retirement annuity awarded to a former military reserve technician under 5 U.S.C. 8456, in addition to being subject to § 844.402 of this part, will terminate when:

(1) An agency hires the annuitant; or

(2) The annuitant declines an offer of employment with an agency that is in the same commuting area and at the same grade or pay level as the position from which the annuitant retired.

§ 844.404 Annuity rights after a disability annuity terminates.

(a) When a disability annuity is terminated because of recovery or restoration of earning capacity and the individual is not employed in the Government, the individual is entitled to an annuity:

(1) Under 5 U.S.C. 8414(b) if the individual:

(i) Is at least age 50 when the disability annuity ceases and had 20 or more years of service at the time of retiring for disability; or

(ii) Has 25 or more years of service at the time of retiring for disability, regardless of age; or

(2) Under 5 U.S.C. 8412(g) if the individual is at least the minimum retirement age applicable under 5 U.S.C. 8412(h) when the disability annuity ceases and had 10 or more years of service at the time of retiring for disability.

(b) When a disability annuitant whose annuity was terminated because of Federal reemployment is separated and meets the age and service requirements for immediate retirement under 5 U.S.C. 8412 or 8414, the individual is entitled to an annuity computed under 5 U.S.C. 8415.

§ 844.405 Reinstatement of disability annuity.

(a) When a disability annuity stops, the individual must again prove that he or she meets the eligibility requirements in order to have the annuity reinstated.

(b) *Reinstatement of annuity terminated based on recovery.* (1) When a recovered disability annuitant under age 62 whose annuity was terminated because he or she was found recovered on the basis of medical evidence (§ 844.401) is not reemployed in a position subject to FERS, and, based on the results of a current medical examination, OPM finds that the disability has recurred, OPM will reinstate the disability annuity as provided in paragraph (d) of this section. The right to the reinstated annuity begins on the date of the medical documentation showing that the disability has recurred, or if the medical documentation clearly shows that the disability recurred on an earlier date, the annuity will be reinstated on that earlier date.

(2) Except in the case of an individual receiving an annuity under § 844.404(b), OPM will, as provided in paragraph (d) of this section, reinstate the disability annuity of a former annuitant whose annuity was terminated because he or she was found recovered on the basis of Federal reemployment when:

(i) The results of a current medical examination show that the individual's medical condition has worsened since the finding of recovery and that the original disability on which retirement was based has recurred; and

(ii) As a result, he or she has been:

(A) Separated and not reemployed in a position subject to FERS; or

(B) Placed in a position that results in a reduction in grade or pay below that from which the individual retired, or in a change to a temporary or intermittent appointment. The right to the reinstated annuity begins on the date the reemployment ends or the effective date of the placement in the position that results in a reduction in grade or pay or change in appointment.

(c) *Reinstatement of annuity terminated because earning capacity was restored.* (1) OPM will reinstate the disability annuity as provided in paragraph (d) of this section when a disability annuitant whose annuity was terminated under § 844.402(a):

(i) Is not reemployed in a position subject to FERS;

(ii) Has not recovered from the disability for which the individual retired (except in the case of a military reserve technician whose annuity was awarded under 5 U.S.C. 8456); and

(iii) Again loses earning capacity, as determined by OPM.

(2) The reinstated annuity is payable from January 1 of the year following the calendar year in which earning capacity was lost. Earning capacity is lost if, during any calendar year, the individual's income from wages or self-employment or both is less than 80 percent of the current rate of basic pay of the position held at retirement.

(d) Except as provided in §§ 844.303 and 844.304, a disability annuity reinstated under the preceding paragraphs of this section is paid at the rate provided under § 844.302(b) until the end of the 12th month beginning after the annuity is reinstated. Thereafter, the rate determined under § 844.302(c) is payable until age 62.

(e) When OPM reinstates an employee's disability annuity, the agency must offset the employee's pay by the amount of annuity allocable to the period of employment. The offset begins on the date of OPM's determination of eligibility for reinstatement. OPM must deduct any retroactive payment of annuity for a period of employment with an agency before that date by the amount of pay earned during that period.

(f) Notwithstanding the preceding paragraphs, an annuity may not be reinstated under this section if the individual is receiving an annuity under part 842 of this chapter.

[FR Doc. 90-4309 Filed 2-23-90; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF THE TREASURY

Office of the Assistant Secretary (Domestic Finance)

17 CFR Parts 400, 403, 449, and 450

Implementing Regulations for the Government Securities Act of 1986

AGENCY: Office of the Assistant Secretary (Domestic Finance), Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury ("Department") is issuing in final form technical amendments to the regulations issued on July 24, 1987 (52 FR 27910) under the Government Securities Act of 1986 (the "GSA"). The amendments are being adopted to conform with certain changes in the regulatory structure of the thrift industry pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The amendments pertain exclusively to those provisions of the GSA regulations in which references are made to the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation ("FSLIC") as the appropriate regulatory agency ("ARA") and the federal insurance agency, respectively, for federally-insured savings institutions that engaged in government securities activities prior to the passage of FIRREA.

EFFECTIVE DATE: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Clifford Rones (Attorney-Advisor) or Kerry Lanham (Government Securities Specialist), Public Debt, Government Securities Regulations Staff, Room 209, 999 E Street, NW., Washington, DC 20239-0001, (202) 376-4632.

SUPPLEMENTARY INFORMATION:

I. Background and Analysis

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA," Pub. L. 101-73, 103 Stat. 183), enacted on August 9, 1989, established the Office of Thrift Supervision to perform certain functions formerly carried out by the Federal Home Loan Bank Board. These functions include the supervision and examination of federally-insured savings associations that are government securities brokers or dealers. The GSA regulations, which were promulgated before the passage of FIRREA, currently specify that the Federal Home Loan Bank Board performs these regulatory responsibilities. This rule amends the regulations to designate the Director of the Office of Thrift Supervision as the

appropriate regulatory agency for savings associations that engage in government securities activities.

More specifically, this rule modifies §§ 400.3(b), 449.1, 449.2, 449.3, 449.4, and 450.2(a) of Title 17 of the Code of Federal Regulations by removing all references to the Federal Home Loan Bank Board as the ARA for federally-insured savings associations that are government securities brokers or dealers or custodians for government securities, and by designating the Director of the Office of Thrift Supervision as the ARA. This action is necessitated by an amendment made by FIRREA to the definition of ARA in the Securities Exchange Act of 1934 (the "Act," 15 U.S.C. 78c(a)(34)(G)), which has been adopted in §§ 400.3(b) and 450.2(a) of the GSA regulations.

FIRREA also abolished FSLIC and authorized the Federal Deposit Insurance Corporation (FDIC) to perform functions formerly performed by FSLIC. Therefore, the FDIC assumed responsibility for all federally-insured deposits, whether held at a bank or savings association. In accordance with this reassignment of responsibilities, this rule amends § 403.5(d)(1)(iii) of the GSA regulations by deleting the reference to FSLIC and, as indicated by the remaining language, clarifies that the FDIC has responsibility for insuring deposits both at banks and savings associations. Section 403.5(d)(1)(iii) specifies that financial institutions which retain custody of repurchase agreement securities (hold-in-custody repos) must notify counterparties that funds held by financial institutions are not federally-insured deposits.

II. Special Analyses

A. Reason for Adoption Without Prior Notice and Comment

The Administrative Procedure Act (APA) (5 U.S.C. 553) generally requires that prior notice and opportunity for comment be afforded before the adoption of rules by federal agencies. Inasmuch as this final rule merely involves changes in designations of appropriate regulatory agencies and deposit insurance funds due to the enactment of FIRREA and does not involve any substantive changes to the regulations, the notice and comment provisions of the APA are unnecessary pursuant to 5 U.S.C. 553(b)(B).

Furthermore, immediate adoption of this final rule is necessary to conform the existing regulations to the changed designations of authority instituted by FIRREA.

Accordingly, pursuant to 5 U.S.C. 553(d)(3), it is determined that a delayed effective date is unnecessary and would be contrary to the public interest.

B. Executive Order 12291; Regulatory Flexibility Act

The final rule involves only non-substantive changes to the existing regulations and therefore is not a major rule for purposes of Executive Order 12291. In addition, since no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

List of Subjects

17 CFR Part 400

Administrative practice and procedure, Banks, banking, Brokers, Government securities, Reporting and recordkeeping requirements.

17 CFR Part 403

Banks, banking, Brokers, Government securities.

17 CFR Part 449

Banks, banking, Brokers, Government securities, Reporting and recordkeeping requirements.

17 CFR Part 450

Banks, banking, Government securities, Reporting and recordkeeping requirements.

For the reasons set out in the Preamble, the Department is amending 17 CFR chapter IV as follows:

PART 400—RULES OF GENERAL APPLICATION

1. The authority citation for part 400 continues to read as follows:

Authority: Sec. 101, Pub. L. 99-571, 100 Stat. 3209 (15 U.S.C. 78o-5).

2. Section 400.3 is amended by revising paragraph (b) to read as follows:

§ 400.3 Definitions.

* * * * *

(b) "Appropriate regulatory agency" has the meaning set out in section 3(a)(34)(G) of the Act (15 U.S.C. 78c(a)(34)(G)), and, with respect to a financial institution for which an appropriate regulatory agency is not explicitly designated, the appropriate regulatory agency is the SEC;

* * * * *

PART 403—PROTECTION OF CUSTOMER SECURITIES AND BALANCES

3. The authority citation for part 403 continues to read as follows:

Authority: Sec. 101, Pub. L. 99-571, 100 Stat. 3209 (15 U.S.C. 78o-5(b)(1)(A), (b)(2)).

4. Section 403.5 is amended by revising paragraph (d)(1)(iii) to read as follows:

§ 403.5 Custody of securities held by financial institutions that are government securities brokers or dealers.

* * * * *

(d)(1) * * *

(iii) Advise the counterparty in the repurchase agreement that the funds held by the financial institution pursuant to a repurchase transaction are not a deposit and therefore are not insured by the Federal Deposit Insurance Corporation, or the National Credit Union Share Insurance Fund, as applicable;

* * * * *

PART 449—FORMS, SECTION 15C OF THE SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for part 449 continues to read as follows:

Authority: Sec. 101, Pub. L. 99-571, 100 Stat. 3208 (15 U.S.C. 78o-5(a), (b)(1)(B), (b)(2)).

§§ 449.1, 449.2, 449.3, 449.4 [Amended]

6. In §§ 449.1, 449.2, 449.3, and 449.4, remove the words "Federal Home Loan Bank Board" and add, in their place, the words "Director of the Office of Thrift Supervision."

* * * * *

PART 450—CUSTODIAL HOLDINGS OF GOVERNMENT SECURITIES BY DEPOSITORY INSTITUTIONS

7. The authority citation for part 450 continues to read as follows:

Authority: Sec. 101, Pub. L. 99-571, 100 Stat. 3208 (15 U.S.C. 78o-5(b)(1)(A), (b)(2), (b)(3)(B)); Sec. 201, Pub. L. 99-571, 100 Stat. 3222-23 (31 U.S.C. 3121, 9110).

§ 450.2 [Amended]

8. Section 450.2 is amended by removing paragraph (a)(1) and redesignating paragraphs (a)(2) and (3) as (a)(1) and (2), respectively.

Dated: February 9, 1990.

David W. Mullins, Jr.,

Assistant Secretary for Domestic Finance.

[FR Doc. 90-4236 Filed 2-23-90; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2 and 284

[Docket No. RM87-34-058]

Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol

Issued February 12, 1990.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; Order Granting Rehearing in part and denying rehearing in part.

SUMMARY: The Federal Energy Regulatory Commission is granting in part and denying in part rehearing of Order No. 500–H (54 FR 52344 December 21, 1989), Commission's final rule responding to the mandates of the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors* v. *FERC (AGD I)*, 824 F.2d 981 (D.C. Cir. 1987), and *American Gas Association* v. *FERC*, 888 F.2d 136 (D.C. Cir. 1989). The Commission reaffirms its conclusion in Order No. 500–H that the actions taken in the Order No. 500 interim rule have worked well to enable the natural gas industry to resolve, in an equitable manner, the take-or-pay problems arising under the gas purchase contracts entered into by pipelines in the late 1970's and early 1980's. The Commission accordingly denies rehearing on all issues, except the issue of the notice which pipelines must give producers before applying take-or-pay credits against a must-take obligation. In order to give producers more time to arrange sales to alternative purchasers, the Commission is extending that notice period from 30 to 60 days.

EFFECTIVE DATE: March 28, 1990.

FOR FURTHER INFORMATION CONTACT: Richard Howe, Jr., Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE, Washington DC 20426, (202) 357–8274.

SUPPLEMENTARY INFORMATION:

[Order No. 500–I]

Order Granting in Part and Denying in Part Rehearing

Issued: February 12, 1990.

I. Introduction

On December 13, 1989, the Federal Energy Regulatory Commission issued Order No. 500–H, a final rule superseding the Order No. 500 interim rule,[1] responding to the mandates of the United States Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors* v. *FERC (AGD I)*,[2] and *American Gas Association* v. *FERC (AGA)*.[3] Order No. 500–H continued, with certain modifications, the open access transportation program originally adopted in Order No. 436[4] and kept in place on an interim basis by Order No. 500. Parties representing all segments of the natural gas industry have filed requests for rehearing of the final rule. The rehearing requests challenge virtually all aspects of Order No. 500–H. This order denies the requests for rehearing except to extend the notice period from 30 to 60 days with respect to must-take gas.

II. Background

The *AGD I* decision generally upheld the substance of Order No. 436. The court, however, vacated and remanded Order No. 436 for the Commission to, among other things, "more convincingly address" the effects of various provisions of Order No. 436 on pipeline take-or-pay problems.[5] The *AGA* decision held that the Order No. 500 interim rule, issued in response to the *AGD I* decision, did not comply with the court's mandate in that decision. The court identified several areas where the Commission had not adequately explained its actions, including the Commission's failure to take action under section 5 of the Natural Gas Act (NGA)[6] to modify producer-pipeline contracts and the Commission's establishment of a sunset date for the Order No. 500 alternative passthrough mechanism before the Commission had taken a final, reasoned position on how the take-or-pay problem should be resolved.

In Order No. 500–H, the Commission found that the actions taken in the Order No. 500 interim rule have worked well to enable the natural gas industry to resolve, in an equitable manner, the take-or-pay problems arising under the gas purchase contracts entered into by pipelines in the late 1970's and early 1980's. The Commission found that, since the issuance of Order No. 500, pipelines have reduced their outstanding take-or-pay exposure to less than 25 percent of its year-end 1986 level.[7] The Commission found that this has been accomplished through settlements in which producers have made significant concessions and that, under the Commission's equitable sharing mechanism, the pipelines are absorbing a significant portion of their payments to producers. The Commission concluded that these facts demonstrate that pipelines, producers, and consumers have been sharing in the burden of resolving the take-or-pay problem.

Based upon these facts and the Commission's view of the current state of the natural gas industry, the Commission took the following actions in Order No. 500–H to address what remains of the take-or-pay problems faced by pipelines. First, the Commission continued in effect, with two modifications, the provisions of Order No. 500 requiring that a producer offer to credit gas transported by a

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[1] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 52 Fed. Reg. 30,334 (Aug. 14, 1987), FERC Stats. & Regs. Regulations Preambles ¶ 30,761, *extension granted*, Order No. 500–A, FERC Stats. & Regs., Regulations Preambles ¶ 30,770, *modified*, Order No. 500–B, FERC Stats. & Regs., Regulations Preambles ¶ 30,772, *modified further*, Order No. 500–C, FERC Stats. & Regs. Regulations Preambles ¶ 30,786 (1987), *modified further*, Order No. 500–D, FERC Stats. & Regs., Regulations Preambles ¶ 30,800, *reh'g denied*, Order No. 500–E, 43 FERC ¶ 61,234, *modified further*, Order No. 500–F, FERC Stats. & Regs., Regulations Preambles ¶ 30,841 (1988), *reh'g denied*, Order No. 500–G, 46 FERC ¶ 61,148 (1989).

[2] 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom.* Southern California Gas Co. v. FERC, 108 S. Ct. 1468 (1988).

[3] No. 87–1588, *et al.*, (D.C. Cir., October 16, 1989).

[4] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol (Order No. 436), 50 Fed. Reg. 42,408 (Oct. 18, 1985), FERC Stats. & Regs., Reg. Preambles 1982–1985 ¶ 30,665 (Oct. 9, 1985), *modified*, Order No. 436–A, 50 FR 52, 217 (Dec. 23, 1985), FERC Stats. & Regs., Reg. Preambles, 1982–1985 ¶ 30,675 (Dec. 12, 1985), *Modified further*, Order No. 436–B, 51 Fed. Reg. 6398 (Feb. 14, 1986), *reh'g denied*, Order No. 436–C, 34 FERC ¶ 61,404 (Mar. 28, 1986), *reh'g denied*, Order No. 436–D, 34 FERC ¶ 61,405 (Mar. 28, 1986), *reconsideration denied*, Order No. 436–E, 34 FERC ¶ 61,403 (Mar. 28, 1986).

[5] 824 F.2d at 1044.

[6] 15 U.S.C. 717 (1988).

[7] The Commission found that pipelines have reduced their outstanding take-or-pay exposure from $10.7 billion at year-end 1986 to $2.4 billion as of March 31, 1989. The $2.4 billion figure for take-or-pay exposure, as of March 1989, was drawn from a study published by the Interstate Natural Gas Association of America (INGAA) in September 1989. In December 1989, after the issuance of Order No. 500–H, INGAA issued an updated study, reporting on pipeline take-or-pay liability through September 30, 1989. The December 1989 study estimates that pipeline liability as of March 31, 1989 was $2.7 billion, instead of the $2.4 billion previously reported. The December 1989 study also estimates that pipeline take-or-pay exposure decreased to $2.3 billion by September 1989. A survey by the Natural Gas Supply Association (NGSA) of 25, mostly large, producers has found that, as of August 1, 1989, total take-or-pay liability to those producers had declined to $388 million. NGSA, A Status Report on Current Interstate Pipeline Take-or-Pay Liabilities for Jurisdictional and Non-Jurisdictional Gas and the Prospects for Future Liability Accrual Associated with Jurisdictional Gas (November 30, 1989), and NGSA, A Pipeline-Requested Adjustment to Lower Total Outstanding Take-or-Pay Liabilities as Reported by the Natural Gas Supply Association (January 8, 1990).

pipeline against that pipeline's take-or-pay liability to the producer accruing under certain pre-June 23, 1987 gas purchase contracts. The final rule established a sunset date for crediting of the earlier of December 31, 1990, or the date a pipeline accepts a certificate for a gas inventory charge. The final rule modified the crediting rules prospectively to provide that a pipeline may, upon 30 days notice, apply credits against any must-take obligation, including for casinghead gas, but must release the gas not purchased.

In Order No. 500–H, the Commission stated that it would not take action under NGA section 5 to modify producer-pipeline contracts. The Commission concluded that, since the Commission lacks authority to modify contracts for the sale of non-jurisdictional gas, section 5 action would not bring about, and could discourage, the complete restructuring of all pipeline-producer contracts necessary to resolve fully the pipelines' take-or-pay problems and complete the transition to a competitive wellhead market.

The Commission in Order No. 500–H modified the Order No. 500 policy statement concerning pipelines' passthrough of take-or-pay settlement costs in only one respect, stating that the Commission would continue to develop its policies on the passthrough of these costs in individual cases. The Commission established a new sunset date for the Order No. 500 alternative passthrough mechanism of December 31, 1990. In Order No. 500–H, the Commission also stated that, if the U.S. Court of Appeals for the D.C. Circuit has not completed judicial review of this final rule by that date, the Commission will extend the sunset dates for both the alternative passthrough mechanism and crediting until 30 days after the date of issuance of the court's mandate upon completion of judicial review.

The Commission stated in Order No. 500–H that it has decided not to restore the contract demand reduction option on a generic basis but will require parties to address this issue in individual rate cases. The Commission did, however, amend the Commission's regulations to provide for automatic abandonment of pipeline sales obligations upon a customer's conversion to transportation.[8]

Subsequent to the issuance of Order No. 500–H, on December 28, 1989, the U.S. Court of Appeals for the D.C. Circuit issued a decision in *Associated Gas Distributors* v. *FERC (AGD II)*, concerning the Commission's orders approving, as modified, the proposal of Tennessee Gas Pipeline Company to pass through take-or-pay settlement costs under the Order No. 500 alternative recovery mechanism. The court held that the Commission's requirement, consistent with the take-or-pay passthrough policies in Order No. 500, that Tennessee's fixed take-or-pay charges be allocated based on its firm sales customers' purchase deficiencies violated the filed rate doctrine. The court, however, affirmed the Commission's finding that pipeline payments to settle take-or-pay obligations did not constitute part of the price paid in a first sale of gas and accordingly such payments do not violate NGPA Title I ceiling prices.

III. Discussion

A. Actions with respect to Producer-Pipeline Contracts

1. Pipeline's Ability to Negotiate Settlements

The Commission's decisions in Order No. 500–H to continue crediting and not to take section 5 action were based largely on the Commission's finding that the actions taken in the Order No. 500 interim rule have worked well to enable the natural gas industry to resolve the take-or-pay problem in an equitable manner. In reaching this conclusion, the Commission relied, in part, on its finding that pipelines have had sufficient bargaining power, under the Order No. 500 program, to resolve their take-or-pay problems through settlements in which the producers have made significant concessions. In particular, the Commission found that pipelines have negotiated settlements under which producers have given relief worth about $44 billion in return for payments averaging 18.6 cents on the dollar, with the result that total outstanding take-or-pay liability has been reduced to less than 25 percent of its level at year-end 1986, the last full year before the issuance of Order No. 500.[9]

On rehearing, a number of pipelines and LDCs contest the Commission's findings that producers have made significant concessions in their settlements and that this demonstrates that pipelines have sufficient bargaining power to resolve their take-or-pay problems through settlements. Rehearing applicants content that (1) the producers' acceptance of payments of 18.6 cents on the dollar do not represent significant concessions, (2) in any event the costs of the settlements have risen to nearly 40 cents on the dollar in 1989, and (3) the court has already held in *AGD I* and *AGA* that pipelines do not have sufficient bargaining power to negotiate reasonable settlements.

Pipelines and LDCs contend that the Commission's reliance on the fact that producers have accepted payments of 18.6 cents on the dollar ignores the fact that the settlements also permit the producer to keep the gas. The rehearing applicants point out that most take-or-pay contracts allow pipelines at least five years to make up gas for which take-or-pay payments are made.[10] They assert that, when the pipeline makes up the gas, it may do so without any additional payment. Thus, they argue, the take-or-pay payment should be understood as an advance to the producer prior to its delivery of the gas. When the pipeline finally takes the gas, the take-or-pay payment has effectively served to give the producer carrying charges as consideration for the pipeline's delay in taking the gas.

Based on these assertions, the rehearing applicants contend that settlement payments of 18.6 cents on the dollar give the producer 100 percent of what is truly bargained for under the contract. The settlement payments allegedly compensate the producer for any lost time value of money resulting from the pipeline's failure to take or pay for the gas as provided by the contract. The producer's ability to sell the gas to another purchaser at a market price allegedly compensates the producer for the pipeline's failure to pay the principal amount required by the contract.

The Commission disagrees with the rehearing applicants' contentions that producers have not made significant concessions in the settlements. As the Commission stated in Order No. 500–H, take-or-pay clauses serve as legitimate,

[8] The Commission also sought information from Tennessee Gas Pipeline Company and its customers necessary to address the *AGA* court's concerns regarding the Commission's failure to retroactively eliminate the contract demand reduction provision. The Commission is addressing those filings in a separate order.

[9] AGD argues that the Final Rule is defective because the Commission used evidence submitted by the pipelines in response to the Commission's requests for additional information in individual passthrough cases to demonstrate the future benefits pipelines gained from the settlements with producers without according parties an opportunity to cross-examine or test this data. On January 30, 1990, AGD filed a motion requesting access to the evidence filed by the pipelines. The Commission will consider AGD's motion in the near future after it receives answers to AGD's motion.

[10] Section 154.103 of the Commission's regulations requires that jurisdictional contracts contain make-up periods of at least five years. 18 CFR 154.103 (1989). While the Commission has proposed elimination of that requirement (Notice of Proposed Rulemaking, Docket No. RM88–20–000, issued July 14, 1988, FERC Stats. and Regs. 32,464), that proposal is still pending.

bargained-for risk allocation mechanisms and require pipelines and their customers to compensate producers in part for the risks they incur in making substantial investments in order to meet the supply needs of these pipelines and their customers.[11] Rehearing applicants ignore the fact that producers in the settlements have given up a substantial portion of their rights under these contracts, rights for which they bargained and which they could have sought to enforce in court. It is true, as rehearing applicants argue, that take-or-pay contracts contain make-up provisions, giving pipelines an opportunity to take gas for which they have made take-or-pay payments. However, at least partly in order to give the pipelines an incentive ultimately to take the gas, these clauses do not give the pipeline an indefinite right to make up the gas, but limit the pipelines' make-up right to, for example, five years. Most of the problem take-or-pay contracts provide that, once the make-up period has expired, the producer is entitled to keep *both* the take-or-pay payment *and* the gas, *and* the pipeline must pay the full contract price for any additional gas it takes under the contract.[12] If such a contract has expired, the producer may keep the take-or-pay payment and sell the gas on the open market to another purchaser.

One of the primary reasons for the settlements is that pipelines may not be able to make up the gas within the applicable make-up period because they no longer have a market for the gas. Under the settlements, the producers have foregone their contractual right both to recieve the full take-or-pay payment and to keep the gas and sell it to either the pipeline or another purchaser. Instead, the producers have agreed to accept payments of, on average, less than 20 percent of the take-or-pay payments to which they were contractually entitled, in addition to retaining the gas. These payments reasonably reimburse producers for their lost opportunity to invest the money which the pipelines were contractually required to pay under the take-or-pay clause, but did not. Even if producers now sell the gas to another purchaser, as rehearing applicants contend the settlements allow the producers to do, the revenue from that sale will not compensate the producers for the fact they have not had the use of the revenue since the time the pipeline should have made the take-or-pay payment.

Furthermore, the problem contracts, having been entered into in the early 1980's or before, in most instances provide for pipelines to pay a price for the gas significantly in excess of today's relatively depressed market price, and producers relied on that price when they invested in exploration and drilling for the gas. When most of the contracts were negotiated, most gas was still subject to NGPA ceiling prices, and producers' investment decisions were based on those prices, not today's market prices; in many cases producers' investment occurred after a contract with the pipeline had already been entered into in which the pipeline agreed to pay the ceiling price.[13] However, when producers sell the gas to another purchaser on the open market they will receive only today's market price which may well be significantly below the original contract price. Thus, under the settlements, producers have foregone their contractual right to obtain a price above the current market price—the price for which they bargained and on which they relied when they invested in drilling for the gas. Thus, if producers had sought to enforce the contract in court, they in all likelihood would have ultimately received significantly more for the gas than they now will under the take-or-pay settlement and selling the gas on the market.

There is thus little doubt that under the settlements the producers have agreed to accept payments by pipelines which are far less than those to which they were entitled under the contracts and which they could have obtained by enforcing the contracts. As stated in Order No. 500–H, in the small number of court cases litigated to judgment without settlement the producers have generally won.[14] On rehearing, no party has contested this fact.

Moreover, even assuming the validity of the rehearing applicants' characterization of the pipelines' settlement payments as compensating the producers for lost carrying charges on the take-or-pay payment while allowing the producer to keep the gas, the settlements nevertheless place producers in a worse position than they would have been if the pipeline had taken and paid for the gas at the time the take-or-pay payment was originally due. This is because, as discussed above, when producers sell the gas they keep under the settlement they will only obtain today's market price, which is usually lower than the price which the pipelines would have paid had they taken and paid for the gas when originally required to do so under the contract.[15] Particularly in view of the fact that producers relied on a price at the level provided in the contract in investing in and developing gas supplies, this is a very significant concession.[16]

The Commission concludes that the settlements represent a reasonable resolution of the industry's take-or-pay problems, not the onerous result of uneven bargaining. Producers, which in all likelihood could have obtained a judgment requiring pipelines to pay the full principal amount of the take-or-pay payment plus interest and kept the gas for sale elsewhere, instead have accepted payment from pipelines representing something significantly less. While producers still keep the gas—as they would have if the pipelines had honored the contract but not made up the gas under the contract—they

[11] Order No. 500–H, 49 FERC ¶ 61,325, Slip op. at 25.

[12] By contrast, some take-or-pay contracts negotiated in the last several years after the development of the take-or-pay problem have a true-up provision under which payments for gas not made up by the end of the contract period would be returned to the pipeline. Others give the producer the option of returning the take-or-pay payment to the pipeline or providing the pipeline gas from a source not covered by the take-or-pay contract.

[13] UDC and others contend that the price called for in the contract represents a windfall to the producer, asserting that the producers' rates escalated unexpectedly under NGPA ceiling prices. Accordingly, they argue that allowing the producer to keep the gas and sell it at current market prices provides a cash flow more consistent with the original contractual expectations of the parties. However, this ignores the fact that the NGPA ceiling prices which are higher than the prexisting area and national rates, adjusted for inflation, were enacted to provide additional incentives for producers to explore for and produce gas not flowing as of the enactment of the NGPA. The producers accordingly relied on these ceiling prices in investing in additional production, and those prices therefore do not represent a windfall to the producer. Moreover, the LDCs benefitted from the additional supplies brought forth by these incentive prices, since these incentive prices yielded additional supplies to end the curtailments of the 1970s.

[14] While producers have generally won the court cases which have gone to judgment, producers have chosen to settle almost all cases rather than proceed to judgment. This is shown by the fact that virtually all the costs which pipelines have filed to pass through under Order No. 500 have been settlement costs, as opposed to payments pursuant to court judgment. The Commission believes that this further buttresses its conclusion that pipelines are able to resolve their take-or-pay problems through settlements.

[15] As shown in Table 4 of Order No. 500–H (49 FERC ¶ 61,325, slip op. at 38), today's average wellhead prices are significantly below pipeline WAGOGs during the period when they have incurred take-or-pay liability, and much of the pipelines' take-or-pay liability has been incurred under contracts calling for higher prices than their average cost of gas.

[16] Moreover, a pipeline's failure to purchase gas in accordance with the contract take terms could also mean that the producer was required to defer (or possibly forgo) other revenue, such as revenue from products produced along with the gas stream (for example condensate, crude oil, etc.) or products that could be extracted from the gas stream (for example propane, butanes, etc.).

must fully accept the risk and sell the gas at the prevailing market price, usually lower than the contract price. In short, producers are left in roughly the position they would have been if they had sold the gas at today's market price at the time the pipelines were required to take or pay for the gas, while the pipelines escape all liability except to compensate producers for the lost carrying charges on their investment resulting from pipelines' failure to comply with their contractual obligations. In the Commission's judgment, this strikes a reasonable balance between the interests of producers and pipelines, and more importantly, results in the gas being released and repriced to market levels, thus addressing the heart of the take-or-pay problem—pipelines having too much gas under contract at above market prices.

Pipelines and LDCs also assert that, even accepting the reasonableness of settlements based on payments of 18.6 cents on the dollar, the more recent settlements have been considerably more expensive to pipelines because the March 31, 1989 sunset date pressured pipelines into unfavorable settlements. These rehearing applicants assert that, while the Commission's 1987 take-or-pay study showed that settlement payments averaged 17 cents per dollar of relief in the first half of 1987, INGAA's September and December 1989 surveys show that, during the first quarter of 1989, pipelines paid 39 cents per dollar of relief and in the second and third quarters of 1989, 37 cents per dollar of relief.

The Commission fully addressed these arguments in Order No. 500–H.[17] Suffice it to say here that these arguments rest entirely on INGAA's estimate that the cents per dollar of relief paid in 1989 settlements, was 37 to 39 cents as compared to the 18.6 cents per dollar figure for relief received in all settlements calculated by the Commission in Order No. 500–H.[18] However, as the Commission stated in Order No. 500–H, INGAA's estimates, unlike the Commission's, are the result of a flawed analysis which does not take into account the future benefits arising from contract reformations.[19] The pipelines' own reports to the Commission of the benefits received under their settlements, which the Commission relied on in determining the 18.6 cents on the dollar figure for all settlements, show that of the $44 billion in benefits pipelines have received under the settlements, nearly $28 billion, or over 60 percent were future benefits resulting from contract reformations. If these future benefits were included in INGAA's studies, its cents on the dollar figure would be reduced to a level comparable to the overall 18.6 cents on the dollar figure that has resulted from all the settlements contained in Order No. 500 filings.

In its rehearing request, INGAA does not contest the Commission's statement that its cents per dollar of relief figure does not take into account future relief. Rather, INGAA simply states that the Commission "misses the point and overlooks the basic fact that if pipelines did not pay more to settle the future effect of take-or-pay contracts before the sunset date, they would not be allowed a reasonable opportunity to recover even a portion of prudently incurred costs *after* the deadline."[20] However, it is INGAA that misses the point. When settlements give a pipeline both past and future relief, one must divide total settlement payments by total relief obtained, both past and future, to obtain an accurate figure for cents paid per dollar of relief. A calculation of the cents paid for each dollar of relief which simply divides total settlement payments by past relief, as INGAA appears by its own admission to have done, must overstate the cents paid for each dollar of relief. Indeed, if, as here, the future relief constitutes over half the relief received, excluding the future relief from the calculation will result in a cents per dollar of relief estimate which is over twice the actual figure. Since INGAA's estimate of the cents paid per dollar of relief in 1989 settlements is slightly over twice the average 18.6 cents figure for all settlements, it appears that, if INGAA's estimate were revised to correctly account for future relief, its estimate of cents paid per dollar of relief in 1989 settlements would be approximately equal to the average figure for all settlements. INGAA's sole response to the Commission's analysis is an allegation that the sunset date forced pipelines to settle the future effect of take-or-pay contracts. However, all this assertion does is to concede the Commission's essential point that a significant part of the relief obtained in the settlements was the future relief, which INGAA concedes it did not take into account.[21]

A number of rehearing applicants contend that INGAA's cents on the dollar estimates for the first three quarters of 1989, when compared with INGAA's estimates for 1985 through 1988, which were calculated in the same manner, at least show a sharp upward trend in pipelines' settlement costs.[22] However, INGAA's flawed calculations naturally cause its figure to show an upward trend. This is because, as Order No. 500–H discussed [23] and the rehearing applicants do not contest, contract reformation has become a more significant part of recent settlements. In the early years of the take-or-pay build-up, when the excess of supply over demand was expected by many to be relatively short-lived, the settlements primarily resolved accrued liability without reforming the contracts for the future. It is only more recently that pipelines and producers have negotiated settlements modifying their entire commercial relationship. Accordingly, INGAA's failure to include future relief in its calculations distorts the estimates for more recent periods more than the estimates for the earlier years.[24]

The Commission's conclusion in Order No. 500–H that the March 31, 1989 sunset date, combined with the litigation exception, did not affect pipeline bargaining power was based not only on the fact that INGAA had seriously overestimated the cost of recent settlements, but also on the ground that this was a reasonable inference from the fact that the pipelines who were engaged in the negotiations did not seek

[17] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 76–80.

[18] See Table 5 in Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 42.

[19] In the September 1989 study (at page 8), INGAA noted, "It is also possible that these negotiations included contract reformation to help mitigate future take-or-pay problems," but INGAA did not determine these benefits.

[20] INGAA's rehearing request at 11 fn. 7.

[21] ANR contends that a factor pressuring pipelines to settle take-or-pay regardless of the cost is the Commission's failure to provide an adequate means to recover actual take-or-pay payments. The Commission believes that it does provide an adequate means to recover such costs. The Commission permits pipelines to include take-or-pay payments in rate base, thus allowing them to earn a rate of return on them. Where the pipeline takes the gas, pipelines may recover the principal amount of the take-or-pay payment, consistent with any applicable NGPA ceiling prices.

[22] INGAA's studies estimate that the cents on the dollar buyout rate rose from 11 cents in 1985 to 17 cents in 1986, 19 cents in 1987, 22 cents in 1988, 39 cents in the first quarter of 1989, and 37 cents in the second and third quarters of 1989.

[23] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 81–82.

[24] INGAA's estimates for 1985 through 1988 also appear to be somewhat overestimated when compared to the responses to the Commission's 1987 take-or-pay data request. Those responses show cents per dollar figures of 10 cents for 1985, 12 cents for 1986, and 17 cents for the first half of 1987, as compared to INGAA's figures of 11 cents for 1985, 17 cents for 1986 and 19 cents for 1987.

any further extension.[25] On rehearing, one party alleges that the parties did not seek rehearing or file a request for a further extension of time because they did not believe the Commission would further extend the date, not because they lacked concern about the effect of the sunset date on their bargaining power. The Commission, however, believes it reasonable to have expected someone to have requested rehearing if the sunset date was expected to seriously affect bargaining power, if only to be careful to preserve the right to judicial review of the March 31, 1989 sunset date by avoiding any argument that a rehearing request was a prerequisite for judicial review. The Commission accordingly relied on the absence of rehearing requests or requests for extensions of time when it allowed the March 31, 1989 sunset date to take effect.

Finally, rehearing applicants contend that the Commission's finding that pipelines have sufficient bargaining power to negotiate settlements is contrary to both the *AGD I* and *AGA* decisions. They point to the *AGD I* court's statements that the Commission appeared to have confused pipelines' incentives to negotiate settlements with their ability to do so and the *AGA* court's statement that the March 31, 1989 sunset date "may have been highly prejudicial to the bargaining power of pipelines." [26] The rehearing applicants' reliance on *AGD I* ignores the fact that following that decision the Commission issued Order No. 500, adopting its take-or-pay crediting regulations as a means of giving pipelines additional bargaining power. The Commission believes that the core holdings of both *AGD I* and *AGA* are that the Commission must provide a full, reasoned explanation for its actions with respect to producer-pipeline contracts, based on a full record, and that neither decision ordered the Commission to take any particular course of action with respect to those contracts or ruled out any specific course of action. In Order No. 500–H and this order, the Commission has tried to fully explain, based on evidence not before either the *AGD I* or *AGA* courts, its determination that, in light of crediting and the Commission's other actions, pipelines do have sufficient bargaining power to negotiate settlements.

2. Crediting

The crediting requirement adopted by the Commission in the Order No. 500 interim rule, as a condition on open-access transportation, was designed to minimize aggravation of take-or-pay problems and assist pipelines in their negotiations of take-or-pay obligations with producers. The Commission's crediting rule required producers to make an offer of credits for transported volumes against take-or-pay liability as part of a request for transportation services.[27] Specifically, a pipeline would have no obligation to transport a particular producer's gas unless that producer offered to credit the volumes to be transported against the pipeline's existing take-or-pay liability under any pre-June 23, 1987 contract with the producer.[28]

The crediting rule contained certain exceptions. Pipelines had to transport without credits (1) gas formerly purchased by the pipeline under a terminated contract, (2) gas formerly purchased under a contract containing a market-out clause giving the pipeline discretion to stop purchasing the gas, (3) certain new gas, and (4) up to 15 percent of a package of gas not covered by an offer of credits under the 85 percent rule (whereby if a pipeline receives offers of credits that account for 85 percent of volumes owned by multiple working interest owners, all the gas tendered must be transported), and (5) certain gas released by intrastate pipelines. In addition, pipelines could not apply credits against must-take obligations for casinghead gas or against pre-1986 take-or-pay liabilities, had to apply credits solely against take-or-pay obligations of producers whose gas they were transporting, had to share a single credit with other pipelines transporting the same gas, and were limited in the way they could apply credits generated by gas sold under percentage of proceeds contracts to processing plants.

The Commission stated in Order No. 500–H that the primary purpose of crediting was to give pipelines additional bargaining power to negotiate reasonable settlements of their take-or-pay problems, and that the evidence concerning the substantial relief obtained by pipelines in their settlements with producers indicated that pipelines do have sufficient bargaining power to negotiate reasonable settlements. The Commission stated that, as shown in Appendix B to Order No. 500–H summarizing the take-or-pay status of individual pipelines, the settlements have substantially resolved the take-or-pay liabilities of most major interstate pipelines, and all pipelines have made significant progress in settling their take-or-pay problems. The Commission concluded that it is a reasonable inference that the pipelines' ability to demand offers of credits in the absence of a settlement was a significant factor in producers' willingness to settle take-or-pay. Accordingly, in the final rule, Order No. 500–H,[29] the Commission made only two changes to the crediting requirement: (1) the Commission prospectively eliminated the provision that credits may not be applied against a pipeline's obligation to take casinghead gas, while at the same time requiring pipelines to release all must-take gas not taken as a result of crediting, and (2) the Commission terminated the take-or-pay crediting provisions by the earlier of December 31, 1990, or the date a pipeline accepts a gas inventory charge (GIC) certificate.

Numerous parties requesting rehearing of Order No. 500–H have raised issues relating to the crediting requirement. Several of them[30] assert that the record clearly demonstrates that the crediting requirement has been "ineffective" at helping pipelines address their take-or-pay problems because the numerous "loopholes" allegedly have resulted in only 2 percent of gas transported from April to September 1989 being subject to crediting.[31] A number of pipelines, LDCs, and state agencies accordingly contend that the final rule fails to support the existence of crediting in the first place and thus that crediting should have been abolished as of the effective date of the final rule Order No. 500–H and replaced by a more effective remedy. United Distribution Companies, in this vein, assert that crediting is "toothless" as a substitute for direct

[25] The Commission stated the only parties seeking rehearing of Order No. 500–F, extending the sunset date to March 31, 1989, contended that the Commission should not have extended the sunset date at all. They contended that a continued right by pipelines to recover take-or-pay costs in a fixed charge would harm consumers.

[26] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 29.

[27] FERC Stats. & Regs. at 30,780.

[28] FERC Stats. & Regs. at 30,847.

[29] 49 FERC ¶ 61,325 (December 13, 1989).

[30] Interstate Natural Gas Association of America, United Distribution Companies, ANR Pipeline Company, Colorado Interstate Gas Company, American Public Gas Association, Peoples Gas Light and Coke Company, North Shore Gas Company, Williams Natural Gas Company, Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Texas Eastern Transmission Corporation, Algonquin Gas Transmission Company, American Gas Association, Consolidated Edison Company of New York, Inc., City Gas Company of Florida, The Kansas Power and Light Company, Peoples Natural Gas Company, Missouri Public Service, Kansas Public Service, Northern Minnesota Utilities, Indicated Producers.

[31] *See* INGAA, Take-or-Pay Exposure and Costs through September 30, 1989, at 7–8.

action pursuant to Section 5 of the Natural Gas Act.

Alternatively, several parties assert that the crediting requirement should be replaced by a broader condition on producer access to open access transportation. Thus, certain parties such as INGAA [32] argue that the record supports that the Commission needs to provide meaningful, broad conditioned access by precluding open access tranportation of all producer gas subject to non-market responsive contracts until such time as the problem contracts are successfully renegotiated to the satisfaction of both parties, or cancelled.

Several parties accept the crediting requirement in principle but assert that the record supports the necessity of strengthening the crediting requirement considerably by eliminating most, if not all, of the exceptions to crediting contained in the final rule, Order No. 500–H. These parties argue that, if the crediting requirement is to be effective, the following changes in how it works must be made: (1) Transfer of credits among pipelines must be permitted,[33] (2) credits must be available for accrued pre-1986 take-or-pay liability,[34] (3) the terminated contract exception must be eliminated because it undermines the very purpose of the final rule, Order No. 500–H, which is to enable pipelines to reduce any aggravation of take-or-pay liability without requiring them to buy out uneconomic contracts,[35] (4) the sunset date for crediting contained in the final rule, Order No. 500–H, must be eliminated because the record demonstrates that take-or-pay exposure is still significant and problem contracts will continue to exist and the sunset date reduces the effectiveness of crediting in increasing pipeline bargaining power,[36] and (5) the elimination, in the final rule, of the casinghead gas exception must be made retroactive.[37]

In addition, certain of the parties have asserted that other individual exceptions to the crediting requirement which were retained in the final rule, Order No. 500–H, are not supported by the record. Natural Gas Pipeline Company of America argues that the market-out gas exception must be eliminated because it permits producers to reject a pipeline's price and, instead, use open access transportation to sell the gas to the pipeline's customers thereby displacing the pipeline's sales and aggravating its take-or-pay situation. Natural also urges elimination of the new gas exception on the grounds that the exception encourages exploration for new gas over the less costly development of proven reserves and that elimination of the exception would encourage producers with substantial quantities of new gas to enter into fair take-or-pay settlements with pipelines concerning old gas.[38]

Natural further argues that intrastate pipeline released gas should not be exempt from the crediting mechanism because double credits are unlikely where an intrastate pipeline releases gas since, in such circumstances, demand is very likely weak. Furthermore, in these circumstances, gas released by intrastate pipelines will, if sold into interstate market, exacerbate interstate pipelines' take-or-pay obligations.[39] Finally, Natural asserts that certain changes should be made with respect to the exception for processing plant gas, including phasing in of the 85 percent rule beginning at 50 percent, requiring all working interest well owner affiliates of a plant operator who is allowed to provide an offer to likewise be required to provide offers to make the gas eligible for open-access transportation, and allowing a transporting pipeline to apply any credits earned to any of its pre-June 23, 1987, contracts with the plant operator or its producer affiliates.

While pipelines and LDCs contend that crediting is inadequate, producers oppose continued crediting as unnecessary alleging that the take-or-pay problem has been resolved. The Producer Associations assert that crediting is now workable, as do the Indicated Producers who assert further that the final rule should have terminated crediting immediately because the principal effect of crediting has been to impose an administrative burden on all producers, including those who have settled all of their take-or-pay claims, with an adverse effect upon the marketability of oil and gas leases, and upon exploration and development of new gas reserves in general. The producers oppose in particular allowing pipelines to apply credits against take-or-pay obligations under contracts other than the contract under which the transported gas was formerly sold to the pipeline.

Certain of the producer parties also make arguments that the Commission erred in removing the casinghead gas exception in the Order No. 500–H final rule because there is no guarantee that gas not taken and released by the pipeline will have a market and therefore not be shut in. In particular, producers are concerned that they will be unable to obtain capacity on the pipelines to transport casinghead and other must-take-gas to alternative purchasers. The producers assert that only a prohibition on the application of credits against casinghead gas can accomplish the goal of not shutting in the gas. Indicated Producers also assert that crediting for OCS gas is contrary to the clear wording of the Outer Continental Shelf Lands Act (OCSLA). Finally, Indicated Producers ask for clarification of Order No. 500–H to make clear that from and after the termination of crediting under the rule, a pipeline can no longer apply credits previously earned to relieve it of take-or-pay obligations which are then in existence or which may thereafter accrue.

Upon consideration of the issues relating to the crediting requirement that have been raised on rehearing, the Commission has concluded that its conclusions reached the final rule, Order No. 500–H, are supported by the record and are legally sufficient.

Pipeline and LDC contentions that crediting is inadequate to address pipeline take-or-pay problems and must be replaced by section 5 action or a broader conditioned access program all state from the premise that pipelines do not currently have sufficient bargaining power to negotiate reasonable settlements of their take-or-pay situation. However, the record set forth in the final rule clearly demonstrates

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[32] Also ANR and CIG, the Public Utilities Commission of the State of California, Natural Gas Pipeline Company of America, Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Texas Eastern Transmission Corporation, Algonquin Gas Transmission Company, American Gas Association, Associated Gas Distributors, and Tennessee Gas Pipeline Company.

[33] Peoples Gas Light Company, North Shore Gas Company, ANR, CIG, Natural Gas Pipeline Company of America.

[34] Peoples Gas Light Company, North Shore Gas Company, ANR, CIG, Natural Gas Pipeline Company of America.

[35] Williams Natural Gas Company, Natural Gas Pipeline Company of America, Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Texas Eastern Transmission Corporation, Algonquin Gas Transmission Company, Associated Gas Distributors, Consolidated Edison Company of New York, Inc., City Gas Company of Florida, The Kansas Power and Light Company, Peoples Natural Gas Company, Missouri Public Service, Kansas Public Service, Northern Minnesota Utilities.

[36] Williams Natural Gas Company, CNG Transmission Corporation, Panhandle Eastern Pipeline Company, Trunkline Gas Company, Texas Eastern Transmission Corporation, Algonquin Gas Transmission Company, Michigan Public Service Commission.

[37] Public Utilities Commission of the State of California.

[38] Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Texas Eastern Transmission Corporation and Algonquin Gas Transmission Company make the same argument.

[39] These same arguments with respect to released gas are made by Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Texas Eastern Transmission Corporation, and Algonquin Gas Transmission Company.

that with the implementation of crediting and the other provisions of the Order No. 500 program continued in the final rule, pipelines have been able to resolve, in an equitable manner, the bulk of their take-or-pay problems. The Commission found in Order No. 500–H that pipelines have reduced their outstanding take-or-pay exposure by over 75 percent since the issuance of Order No. 500. [40] During the same period, the 22 major pipelines which reported significant take-or-pay exposure as of year-end 1986 entered settlements with producers giving the pipelines total take-or-pay relief worth approximately $44 billion in return for payments of $8.2 billion or 18.6 cents per dollar of relief.[41] As discussed in the preceding section, noting petitioners have said on rehearing undercuts the Commission's finding in Order No. 500-H that producers have made significant concessions in these settlements. If anything, rehearing applicants' characterization of the settlements confirms the Commission's conclusion that the settlements represent significant concessions by both pipelines and producers and an equitable resolution of the take-or-pay problem.

Furthermore, the Commission included in Order No. 500–H an appendix (appendix B) summarizing the take-or-pay status of each interstate pipeline with significant take-or-pay problems. Based on that summary, the Commission concluded that the settlements have substantially resolved the take-or-pay liabilities of most major interstate pipelines, and that all pipelines have made substantial progress in settling their take or-pay problems. While various pipelines and others have, on rehearing, made general assertions that pipelines have not resolved all their take-or-pay problems and that some producers continue to assert take-or-pay claims, no rehearing applicant has contested the accuracy of the specific facts set forth in appendix B concerning the take-or-pay status of each pipeline or provided any analysis to suggest that a particular pipeline, contrary to the Commission's findings in Order No. 500–H, has not made substantial progress in resolving its take-or-pay problems.

As the Commission stated in Order No. 500–H, pipelines could not have made the significant progress in resolving pipeline take-or-pay problems discussed above if they lacked bargaining power in their negotiations with producers. The Commission further stated that, while it cannot know the producers' motivations in agreeing to the post-Order No 500 settlements, it is a reasonable inference that the pipelines' ability to demand offers of credits in the absence of a settlement was a significant factor in producers' willingness to settle take-or-pay.[42] In order No. 500–H, the Commission summarized a number of reasons why producers find it advantageous to obtain the pipeline's agreement to transport gas without credits. These included that facts that (1) crediting gives pipelines substantially greater rights than they generally received under release agreements negotiated before Order No. 500, (2) a pipeline can wait until the end of the contract year before informing the producer that it intends to apply credits against that contract, making planning difficult for the producer, (3) crediting can make property transfers more difficult, and (4) where there are multiple owners of gas to be transported, obtaining all the necessary offers of credits is very burdensome. The rehearing applicants do not deny that these factors make it advantageous for producers to avoid having to offer credits.

While some rehearing applicants point to the December 1989 INGAA study as showing that only 2 percent of gas transported during April-September 1989 resulted in credits under Order No. 500, that data, what ever its validity, does not contradict the Commission's conclusion that crediting has increased pipeline bargaining power. As the Commission stated in Order No. 500–H,[43] it appears that producers have preferred to enter into settlements in order to obtain transportation without an offer of credits, rather than to actually give the pipeline an offer of credits. This conclusion is supported by the evidence concerning the significance of the settlements discussed above. In any event, since pipelines are resolving their take-or-pay problems through settlements, the Commission does not believe that more intrusive action by the Commission to resolve take-or-pay, such as action under NGA section 5, is justified regardless of the reasons producers have agreed to the settlements.

Turning to specific points raised regarding the crediting requirements in the requests for rehearing, the Commission considers first several parties' assertions that the Commission should replace the crediting requirement with a broader condition on access by permitting pipelines to refuse transportation of all producer gas subject to non-market responsive contracts, until such time as the problem contracts are successfully renegotiated to the satisfaction of both parties, or cancelled. In the final rule, the Commission explained in detail why it would not give pipelines such broad discretion to refuse to transport a producer's gas. The Commission stated that granting pipelines such a broad right to refuse to transport gas would vitiate the open access condition in the Commission's regulations because, since the pipeline would have sole discretion to determine whether the producer had offered adequate take-or-pay relief, the pipeline would, for all practical purposes, have an unlimited opportunity to exercise its monopoly power over transportation to refuse to transport gas. This, the Commission stated, would be inconsistent with Congress' intent, expressly stated in the legislative history of the Wellhead Decontrol Act, that the Commission continue to encourage competition and broaden open access transportation.[44] The Commission stated that, by contrast, under the crediting rules, pipelines' ability to refuse transportation is carefully circumscribed because the crediting rules require the pipeline to transport a producer's gas if the producer offers credits as provided in Order No. 500. The Commission concluded that, since pipelines have been resolving their take-or-pay problems under the Order No. 500 interim rule while consumers received the benefits of lower prices brought about by wellhead decontrol and open access transprotation, there was no reason in the final rule to give pipelines additional rights to refuse transportation.

On rehearing, no party has demonstrated that the Commission's reasoning in the final rule was incorrect or invalid. Some parties suggest that the Commission could give pipelines a broader right to refuse to transport gas than that given by crediting without giving pipelines the unlimited discretion to refuse to transport discussed in Order No. 500–H. AGA and others point that, in *AGD I*, the court suggested that the Commission could avoid giving pipelines unlimited discretion to refuse to transport by "impos[ing] both procedural and substantive limits on pipeline use of any conditioning power," [45] and that the court suggested

[40] *See* Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 36.

[41] *See* Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 41.

[42] *Id.* at 53–58.

[43] *Id.* at 57–58.

[44] See Order 500–H, 49 FERC ¶ 61,325, slip op. at 58–59.

[45] 824 F.2d at 1029.

(1) requiring the pipeline to specify the allegedly offending contracts, (2) limiting the condition rule to contracts entered into before some date, or (3) identifying price and take provisions that unduly thwart the Commission's purpose in Order No. 436 and its duty to protect consumers. AGA asserts that the commission improperly failed to address these proposals

However, the court expressly stated that it did "not mean to suggest that the Commission need consider any of the options discussed." [46] In fact, while the Commission did not limit pipelines' right to condition transportation in the manner described by the court, the Commission's crediting program is intended, consistent with the court's general suggestion that the Commission could limit pipelines' conditioning authority, to give pipelines a limited right to obtain take-or-pay credits without giving them unlimited use of their monopoly over transportation. The Commission believes that crediting, as adopted, properly balances the need to ensure that pipelines have appropriate bargaining power with the need to avoid giving pipelines such broad power to condition access as to significantly reduce the benefits of a competitive gas market and open access transportation.

A primary advantage of crediting over other forms of conditioned access is that it relates the amount of take-or-pay relief the pipeline may demand to the benefits the producer is likely to obtain from the transportation in question, since the amount of credits the pipeline can receive depends on the amount of gas it transports. The more gas a pipeline transports the more credits that may be generated. By contrast, allowing a pipeline to refuse to transport gas until disputes as to all its contracts with a producer, or even just as to call contracts entered into before a particular date, are resolved may enable the pipeline to demand relief far in excess of any benefits the producer may obtain through the transportation in question and cause significant market disruptions. This is because the accrued take-or-pay liability and potential income to the producer under the disputed contracts with the pipeline could well be in excess of the revenue the producers will receive by selling the gas being transported. In these circumstances, the pipeline's right to refuse transportation could well result in the gas not being transported, since some producers may prefer not to sell the gas and press their claims in court, rather than submit to the pipeline's demands.[47] This could significantly reduce the benefits of open access transportation by reducing the amount of gas available for sale to those desiring to purchase from procedures or marketers rather than from the pipeline, thereby reducing the competitive pressures on prices created by open access transportation. Given the fact that pipelines are resolving their take-or-pay problems in an equitable manner pursuant to the Commission's current policies, the Commission sees no reason to give pipelines a broader right to condition access with these potentially adverse consequences on the open access transportation program and the consumer benefits accruing from it.

In addition, a further difficulty with identifying particular "problem" price or take provisions is that these can vary with the individual circumstances of a particular pipeline and producer. Since pipelines roll in their costs of purchasing gas under all their contracts in computing their sale price to their customers, a contract with particular price and take provisions could be a problem for one pipeline without a large amount of lower priced gas to offset the costs under that contract, but not a problem for another pipeline with more lower priced gas under contract. Furthermore, as discussed in Order No. 500–H, some reservoirs may require higher rates of production to maximize the amount of gas recovered, whereas other reservoirs can be produced at lower rates without affecting ultimate levels of recoverability.[48] Also, smaller producers with less financial revenues and possibly less ability to sell to others may have different needs than larger producers with greater financial resources. Given these and other varying circumstances, the Commission believes that any attempt to specify contract provisions which the pipeline can require the producer to change would be counterproductive and could complicate the settlement negotiations which all evidence suggests is working well under the Commission's current policies.

Finally, requiring pipelines to specify the offending contracts would effectively give them unlimited discretion to refuse transportation in the absence of satisfactory relief, unless the Commission in some way limited the contracts the pipeline could specify. But this leads to the numerous problems just discussed.

Only Natural Gas Pipeline Company and Tennessee Gas Pipeline Company have made specific proposals for a condition on access which is broader than that provided by crediting but which allegedly does not give the pipeline an unlimited right to refuse transportation. Natural would require that an open access pipeline must transport a producer's gas only when the producer agreed to open all its gas contracts with all open access pipelines to a "good faith renegotiation procedure" with respect to price and take provisions. This procedure would give the pipeline the right to terminate any contract which the producer did not offer to renegotiate in a manner satisfactory to the pipeline, and if the pipeline terminated the contract the producer would have to repay all take-or-pay payments still subject to make-up. However, this proposal, like the conditions discussed above, would place pipelines in a bargaining position to exercise their monopoly power over transportation and to demand concessions from producers worth significantly more than the benefits producers would receive from obtaining the transportation in question. Natural's proposal would give, not only the transporting pipeline, but all other open access pipelines, an unlimited right to abrogate all purchase contracts with the producer and obtain elimination of all outstanding take-or-pay liability still subject to make-up rights (essentially all liability which accrued over the last five years). This makes obtaining open access transportation so potentially costly to most producers that it essentially gives pipelines an unlimited right to refuse to transport gas unless a producer offers a settlement satisfactory to the pipeline. Thus, for the same reasons discussed above with respect to other possible broader conditions on access, Natural's proposal would undermine significantly the benefits of open access transportation in increasing competition in the natural gas industry and lowering prices for all consumers.

Tennessee's proposal would require producers to waive any further accrual of take-or-pay liability under all their contracts with the transporting pipeline for the duration of any transportation performed by the pipeline. Tennessee's proposal would enable the pipeline to escape the accrual of any take-or-pay liability under all its take-or-pay contracts with the producer for the duration of the transportation. Similar to Natural's proposal, this could give the pipeline take-or-pay relief worth

[46] Id.

[47] Other producers, however, lack the resources to litigate, and rely heavily on gas sale revenue to meet their financial obligations. In this situation pipelines could extract unreasonable concessions because of their unequal bargaining power.

[48] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 108.

significantly more than the benefits to the producer from the open access transportation, since the take-or-pay contracts between the producer and the pipeline might require the pipeline to take-or-pay for significantly more gas than the producer desires to have transported, with the result that the waived take-or-pay liability could be significantly in excess of the revenue from the sale of the transported gas. On the other hand, to the extent a producer desired a pipeline to transport a greater amount of gas than the amount of gas for which the pipeline is currently incurring take-or-pay obligations, Tennessee's proposal could give the pipeline less take-or-pay relief than the Commission's crediting regulations, since those regulations, unlike Tennessee's proposal, would allow application of credits against certain previously accrued liability. Thus, the Commission believes that the crediting regulations more closely relate the amount of take-or-pay relief for which pipelines qualify in return for transporting the gas to the benefits that producers will receive from the transportation, and thus crediting better balances the bargaining power of pipelines and producers and is less likely to undercut the benefits of open access transportation. Accordingly, the Commission rejects Tennessee's and the other requests for rehearing on this issue.

Several parties accept crediting as an appropriate condition on access in principle but assert that the crediting requirement must be strengthened considerably by eliminating most, if not all, of the exceptions contained in the final rule. Peoples Gas Light Company, North Shore Gas Company, ANR, CIG, and Natural Gas Pipeline Company of America assert both that transfer of credits among pipelines must be permitted and that credits must be available for accrued pre-1986 take-or-pay liability. They state that the former would prevent a producer from avoiding any crediting by transporting its gas on another pipeline with which the producer had no previous take-or-pay contracts and the latter would provide relief with respect to previously accrued take-or-pay which constitutes much of total take-or-pay liability.

In Order No. 500–H, the Commission declined to amend the interim rule to provide for the transfer of credits.[49] The Commission found that such transfer was unnecessary because, among other things, there are significant costs to producers in avoiding transportation on pipelines with which they have take-or-pay contracts, since this reduces the purchasers to whom they can sell their gas. In addition, some producers are connected to only one pipeline and must rely on that contract for access to the market. The Commission also declined to make credits available for accrued pre-1986 take-or-pay liability because those take-or-pay obligations accrued before pipelines began transporting gas under Order No. 436 and thus could not have been caused by open access transportation and most such liability has been resolved in any event.

The arguments raised on rehearing with respect to both of these issues—transfer of credits and credits for accrued pre-1986 take-or-pay liability—merely repeat what was previously raised by the same and other parties in earlier proceedings leading to the issuance of the final rule, Order No. 500–H. Nothing new has been presented to alter the Commission's previous conclusions.

Rehearing has been sought with respect to several other exceptions to the crediting requirements for the same reasons as were previously raised in proceedings leading to the issuance of the final rule, Order No. 500–H. Several pipelines and LDCs assert that the terminated contract exception must be removed because pipeline transportation of gas formerly sold under the terminated contracts can aggravate take-or-pay liability. They also assert that the market-out exception serves to displace pipeline sales and aggravate take-or-pay.[50] In the case of the new gas exception, they urge again that it improperly limits the take-or-pay relief afforded by crediting and improperly encourages of unneeded relatively expensive reserves. In the case of the released gas exception it is asserted once more that gas releases by intrastate pipelines will, if sold into the interstate market, exacerbate interstate pipelines' take-or-pay liability. And, in the case of the 85 percent rule, adjustments are sought which were previously contemplated by the Commission both in Order No. 500–B, where the 85 percent rule was put into effect, and in the final rule, Order No. 500–H. Finally, some rehearing applicants suggest certain changes to the special rule concerning processing plants.

In the case of each of these exceptions to the crediting requirement and the requests for rehearing with respect thereto, the Commission fails to find any basis for granting rehearing. In each case, the Commission has previously considered the same arguments and, in the final rule, has discussed at length the policy reasons for these exceptions and the terms and limitations of each. Furthermore, Order No. 500–H continued these exceptions unchanged. Accordingly, all were addressed on judicial review of the Order No. 500 interim rule. In *AGA*, the court held that appellants' objections to the exceptions to crediting, other than the casinghead gas exception modified in Order No. 500–H, "are adequately met in the Commission's orders; we need not elaborate here upon the points and counterpoints in order to accept the Commission's reasoning." [51]

Williams Natural Gas Company asserts that its specific facts show that the Order No. 500–H crediting requirement will not provide any meaningful take-or-pay relief to Williams unless it is modified. Williams alleges that its largest remaining take-or-pay exposure relates to Wyoming tight formation contracts which have now been terminated pursuant to contractual economic out rights exercisable after 10 years. Williams states that, while in past years it was able generally to avoid take-or-pay under these contracts, recently because of Order No. 451, the Commission's failure to eliminate the incentive tight sands price, and the fact that Williams is now an open-access pipeline, Williams incurred substantial take-or-pay exposure under those contracts. According to Williams, a claim by Amoco, Williams' largest single supplier, for approximately $203 million in take-or-pay is in litigation, although Williams is contesting that claim. Williams states that because of the Order No. 500–H terminated contract exception, it apparently will be required to transport this gas for Amoco to Williams' resale markets or elsewhere without take-or-pay credits. Williams contends that the terminated contract exception should be modified at least to permit transportation of gas formerly subject to the terminated contract to generate credits against outstanding

[49] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 153–54.

[50] In asserting that the market-out exception may reduce take-or-pay relief to it, Natural appears to assume that the market-out exception applies even where the contract does not give the pipeline the unilateral right to market-out. As explained in Order No. 500–H, the market-out exception applies only where a market-out clause gives the pipeline "absolute discretion to terminate the contract at any time." Slip op. at 140.

[51] 888 F.2d at 149–150. The court did state that it was not deciding whether the crediting mechanism as a whole adequately responded to the mandate of *AGD I*. For the reasons already discussed the Commission believes that it does

take-or-pay liability under the terminated contract. The Commission rejects Williams' rehearing request. The Commission continues to believe that application of the terminated contract exception in these circumstances is appropriate, since Williams' exercise of its right to terminate the contract provided it take-or-pay relief by enabling it to terminate the contract so that new take-or-pay is no longer accruing. In addition, Williams' commercial disputes with Amoco are currently being addressed in other forums and proceedings. The events giving rise to the economic consequences of Williams' actions with respect to its gas suppliers are more appropriately addressed in those proceedings.[52]

Several parties [53] assert that the sunset date for crediting contained in the final rule, Order No. 500–H, of the earlier of December 31, 1990, or the date a pipeline accepts a gas inventory charge (GIC) certificate, must be eliminated because the record demonstrates that take-or-pay exposure is still significant and problem contracts will continue to exist. When, in Order No. 500–H,[54] the Commission adopted the sunset date for crediting the Commission stated that the downward trend in take-or-pay exposure under the interim rule, Order No. 500–H, indicated that by the end of 1990 pipeline take-or-pay problems should be reduced to the point that the advantages of any further continuation of crediting would be outweighed by the burdens of crediting on the transportation and production of gas. Reports issued after the issuance of Order No. 500–H by INGAA and NGSA indicate that the decline in outstanding take-or-pay liability is continuing, thus giving further support to the Commission's earlier analysis in Order No. 500–H. Furthermore, the Commission expects, by December 31, 1990, to be able to consider most if not all, of the pending GIC applications. The Commission believes that continued crediting after implementation of a GIC would be inconsistent with the Commission's policy that a GIC should be the pipeline's only mechanism for the recovery of take-or-pay costs. Any take-or-pay incurred by the pipeline would be recoverable in the GIC itself, thereby eliminating the need for crediting.

Several parties have requested that the Commission further revise the crediting mechanism as it applies to casinghead gas. In the final rule the Commission prospectively terminated the casinghead gas exception, while at the same time requiring pipelines to release all must-take gas not taken as a result of crediting. One party, the Public Utilities Commission of the State of California, requests that the elimination of the exception be made retroactive. California has not, however, offered any grounds for its request which the Commission did not recite and evaluate in deciding in Order No. 500–H to eliminate the exception prospectively.[55]

The Indicated Producers and Producer Associations both argue that the Commission should have retained the casinghead gas exception in the final rule and expanded it to cover all must-take gas. They contend that the Commissions' action of requiring that pipelines applying credits against casinghead and other must-take gas release that gas will not assure that the gas is not shut-in. They state that the producer may not be able to market the gas to an alternative purchaser because the producer may not be able to obtain transportation capacity on the pipeline. These producers assert that only an exception from crediting for casinghead and other must-take gas can accomplish the goal of not shutting in the gas. Alternatively, they assert that the final rule should be modified to require 90-days' notice prior to the application of crediting to casinghead gas.

In Order No. 500–H, the Commission explained that the wide availability of open-access transportation makes it likely that producers can market to other purchasers casinghead and other must-take gas not taken by the pipeline.[56] The Commission believes that the shutting in of casinghead gas is unlikely in these circumstances. However, in order to ensure that producers do have adequate time to find a second purchaser of released gas, the Commission amends the final rule to provide a 60-day notice period. If, however, a producer encounters difficulty obtaining transportation capacity during the 60-day period, it should file a petition for relief with the Commission and the Commission will consider appropriate action on an expedited basis.

Indicated Producers have raised two issues involving the Commission's authority to permit pipelines to require producers to offer credits for transportation provided pursuant to a pipeline's Order No. 500 blanket certificate and transportation on the Outer Continental Shelf.

With respect to the issue of the Commission's authority to permit crediting for transportation under a blanket certificate, the Commission held in Order No. 500–H that crediting is a proper exercise of its conditioning authority under section 7(e) of the Natural Gas Act.[57] The Commission held that such crediting is not inconsistent with the holding of *Panhandle Eastern Pipeline Co.* v. *FERC*,[58] that the Commission may not exercise its section 7(e) conditioning authority to require adjustments in previously approved rates for service not before it in the relevant certificate proceeding. The Commission explained that the condition imposed here does not directly modify any rates not before the Commission in the certificate proceeding, but is instead a condition on the pipeline's performance of the very transportation service being certificated.[59] On rehearing, producers effectively concede that the Commission may exercise its section 7(e) conditioning authority to require an offer of credits against take-or-pay obligations contained in the contracts to which the gas being transported is (or was formerly) subject. However, they contend that the Commission may not permit the pipeline to require an offer of credits against take-or-pay obligations contained in other contracts covering gas as to which no transportation authority is sought.

The Commission's authority to permit pipelines to refuse transportation service under a blanket certificate in the absence of an offer of credits is the same regardless of the contract against which the credits would be applied. As the Commission explained in Order No. 500–H, the crediting condition, unlike the condition in *Panhandle Eastern*, does not directly modify any rate not before the Commission in the certificate proceeding. Rather, it determines when the pipeline must perform, or may decline to perform, the very transportation service being certificated. The purpose of the condition is to

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[52] Amoco Production Company, Docket No. GP89–54–000.

[53] Williams Natural Gas Company, CNG Transmission Corporation, Panhandle Eastern Pipeline Company, Trunkline Gas Company, Texas Eastern Transmission Corporation, Algonquin Gas Transmission Company, and the Michigan Public Service Commission.

[54] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 59–60.

[55] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 70–72.

[56] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 65–66.

[57] *See* Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 177–124.

[58] 613 F.2d 1120, 1127, 1133 (D.C. Cir. 1979), *cert. denied* 449 U.S. 889 (1980).

[59] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 118–123.

address the court's concern that requiring a pipeline to transport a producer's gas regardless of take-or-pay relief deprives pipelines of the bargaining power necessary to negotiate reasonable settlements, and yet not give pipelines unlimited discretion to refuse to transport gas. Giving pipelines such discretion would seriously undermine the Commission's goal, in issuing blanket transportation certificates, of making competitively priced gas available to a wide array of consumers. It would also increase the risk that a pipeline could refuse to transport gas in an unduly discriminatory manner in violation of NGA section 5. The crediting thus directly relates to the very transportation service being certificated.

Furthermore, while the limited right to refuse to transport enhances pipelines' ability to negotiate changes to their contracts with producers, it is not designed as a substitute for Commission action under NGA sections 4 or 5 to determine whether new or existing contracts are unjust and unreasonable and to fix just and reasonable contractual provisions. As the Commission stated in Order No. 500–H, the NGA presumes private contracting between producers and pipelines. Thus, the NGA contemplated that parties would continue to negotiate private contracts which would thereafter be subject to Commission review under NGA sections 4 and 5 to determine whether the negotiated contracts are just and reasonable and, if not, to fix just and reasonable rates. *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 339 (1956). ("The Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.") The crediting condition to the blanket certificate addresses the parties' bargaining power in the private negotiation of the contracts which takes place before Commission review under NGA section 4 and 5.

Secondly, Indicated Producers assert that crediting for OCS gas is contrary to the clear wording of section 5(f) of the OCSLA providing that a "pipeline must provide open and non-discriminatory access to both owner and nonowner shippers." [60] As the Commission stated in Order No. 500–H,[61] the Commission does not believe that Congress intended the non-discriminatory access provisions of OCSLA section 5(e) and (f) to prevent the Commission, in implementing those provisions, from taking actions under NGA section 7 reasonably designed to facilitate the implementation of these provisions by minimizing potential adverse effects during the transition to open access transportation on both the OCS and onshore. This is buttressed by the fact that OCSLA section 5(f)(4), which provides that nothing in the OCSLA abridges or modifies existing provisions of law concerning OCS pipelines, preserves the Commission's NGA section 7(e) conditioning authority with respect to certificates for service on the OCS. Furthermore, exempting producers on the OCS from the crediting provisions of Order No. 500 while subjecting onshore producers to those provisions would give unduly preferential treatment to OCS producers in violation of NGA section 5. This would also be contrary to OCSLA section 5(f)(4) providing that the OCSLA does not modify existing law with respect to OCS pipelines.

Finally, Indicated Producers ask for clarification of Order No. 500–H to make clear that from and after the termination of crediting under the rule, a pipeline can no longer apply credits previously earned to relieve it of take-or-pay obligations which are then in existence or which may thereafter accrue. The Commission clarifies that this was its intent.

3. Action Under Section 5

In Order No. 500–H, the Commission concluded that it would not take action under NGA section 5 in the final rule to modify producer-pipeline take-or-pay contracts. In Order No. 500–H, the Commission concluded that it cannot take section 5 action to modify producer-pipeline contracts for the sale of gas removed from the Commission's NGA jurisdiction by NGPA section 601. The Commission found that it had no jurisdiction to modify the price terms of either jurisdictional or nonjurisdictional contracts because NGPA section 601 deemed any price paid in a first sale to be just and reasonable so long as it does not exceed an applicable ceiling price. The Commission held that, because the Commission's section 5 authority is limited, section 5 action would be ineffective or inequitable or both, and could discourage the efficient restructuring of all the pipeline-producer contracts necessary to fully resolve the pipelines' take-or-pay problems and effectuate the transition to a competitive wellhead market. In addition, the Commission concluded that pipelines are able to solve their take-or-pay problems through settlements.

a. *Commission Jurisdiction Over NGPA Deregulated Gas.* In Order No. 500–H, the Commission concluded that it had no jurisdiction to modify producer-pipeline contracts for the sale of gas removed from the Commission's NGA jurisdiction by NGPA section 601. The Commission found that NGPA section 601, by removing the Commission's jurisdiction over certain first sales and over companies making those first sales, removed all of the producer's activities and the entire producer-pipeline transaction with respect to nonjurisdictional gas from the Commission's jurisdiction. The Commission stated that the Commission's NGA section 5(a) authority with respect to contracts "affecting" the pipeline's sales for resale rates does not include the power to modify the contract for the sale of non-jurisdictional gas. The Commission reasoned that under section 5(a), it may directly modify only jurisdictional contracts and not non-jurisdictional contracts which affect a pipeline's rates, "including labor contracts between the pipeline and its employees, contracts for the purchase of office equipment, and leases of office space." [62] In addition, the Commission stated that Commission retention of jurisdiction to modify non-jurisdictional contracts would be inconsistent with Congress' intent in enacting the NGPA that the market and not the Commission determine all aspects of the producer-pipeline transaction.

(i) *Petitioners' Contentions.* Petitioners argue that the Commission has NGA section 5 jurisdiction over provisions in contracts with respect to NGPA deregulated gas. The essence of their argument is that the NGPA removed only the first sale and the producer of first sale gas from NGA section 5 jurisdiction. They argue that, therefore, the Commission has jurisdiction to examine the provisions of contracts that affect the jurisdictional rate charged by the pipeline. Some petitioners [63] refer to *Abrams* v. *Texas*

[60] 43 U.S.C. 1334(e)(f)(1) (1982).

[61] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 128.

[62] *Id.* at 94. In FPC v. Conway, 426 U.S. 271 (1976), the Supreme Court interpreted the similar provision of the Federal Power Act to permit the Commission to consider nonjurisdictional contracts in establishing jurisdictional rates. However, the Court stated that the Commission did not have authority to change the nonjurisdictional electric retail rates.

[63] *E.g.*, the Associated Gas Distributors (AGD).

Eastern Transmission Corp.,[64] as support for their position. In addition, the Illinois Commerce Commission (ICC) argues that it is sufficient for the Commission to have jurisdiction over one party to a contract as witnessed by Commission jurisdiction over pipeline-LDC contracts. The Tennessee Gas Pipeline Company (Tennessee) argues that the Commission has taken a position that is inconsistent with certain gathering and processing cases where the Commission exerted jurisdiction over those rates or charges in connection with transportation.[65]

(ii) *Discussion.* The Commission denies rehearing and adheres to its discussion of this issue in Order No. 500–H and to its conclusion that it has no jurisdiction to take section 5 action against producer-pipeline contracts for the sale of gas removed from the Commission's NGA jurisdiction by NGPA section 601. The Commission believes that most of the petitioners' arguments have been discussed fully in Order No. 500–H and, therefore, need not be addressed here. The Commission will discuss, however, the *Abrams* order and the points raised by the ICC and Tennessee.

The *Abrams* order involved a complaint filed by the Attorney General of the State of New York against Texas Eastern in which he alleged that Texas Eastern engaged in imprudent purchasing practices. The Commission noted the following:

> Texas Eastern contends that because the allegations may go to the question of the amount paid for gas, any attempt to use such allegations to support a section 5 investigation is barred by section 601 of the Natural Gas Policy Act of 1978 . . . We disagree. We do not construe section 601 as removing our authority under section 5 to examine contracts and practices and to provide for appropriate relief where such contracts or practices are found to be unjust, unreasonable, unduly discriminatory or preferential. Any limitations upon the Commission's authority in the NGPA are strictly circumscribed and all other powers under the NGA remain unaffected.[66]

Abrams, which was an order on rehearing of an order establishing a hearing, was referring to NGA section 5 remedies with respect to the pipeline and its passthrough to its customers of costs it incurred for jurisdictional and non-jurisdictional gas under contracts with a producer found to be unjust and unreasonable. The Commission did not mean to suggest in *Abrams* that it had authority to modify producer-pipeline contracts for the sale of nonjurisdictional gas so as to affect pipeline obligations under that contract.[67]

The ICC's argument that the Commission need only have jurisdiction over one party to a contract is incorrect as applied to the instant situation. It is adequate for the Commission to have jurisdiction over only the pipeline in pipeline-LDC contracts because the Commission has jurisdiction over the pipeline and its rates. The Commission does not have jurisdiction over the LDC or its rates. For the instant situation, the Commission's authority with respect to the producer is similar to a state commission's authority with respect to the pipeline-LDC contract in a state proceeding. Just as the state commission has jurisdiction only over the LDC purchasing from the pipeline, so also here the Commission has jurisdiction only over the pipeline purchasing from the producer. The Commission may act with respect to the pipeline's rates just as the state agency may act with respect to the LDC's rates.[68] But the Commission may not alter the producer-pipeline contract just as the state agency may not alter the pipeline-LDC contract.

The gathering and processing cases cited by Tennessee are inapposite. Those cases involved the rates and terms of services provided by the jurisdictional pipeline in connection with its jurisdictional transportation service. Here, the nonjurisdictional services (first sales of gas) and charges are those of the nonjurisdictional producer and have no connection with a jurisdictional activity of the producer.

Last, the Commission believes its conclusion here is in accord with the Congress' opinion about Commission jurisdiction over deregulated gas as evidenced by the legislative history of the Natural Gas Wellhead Decontrol Act.[69] Both the Senate and House Committee reports to that act describe the NGPA as bringing about the "complete removal of Federal controls on new gas." [70] Congress in enacting the new Act used language identical to that of the NGPA in effecting further deregulation. This shows that Congress' statements about the extent of deregulation under the new Act also apply to the gas already deregulated by the NGPA. In this vein, that deregulation means total deregulation (except for passthrough in the pipeline's rates) is shown by the report of the Senate Committee on Energy and Natural Resources' statement that:

> Once the "underbrush" of price *and non-price regulation (and the resulting impact of such regulation upon gas purchase contracts)* is cleared away, natural gas producers will be inclined to maximize profits by producing gas that is the least expensive to drill and produce. . . Over time, competition among efficient producers will help to keep natural gas commodity prices at the lowest reasonable price necessary to summon forth sufficient gas supplies to meet consumer demand.[71]

The report of the House Committee on Energy and Commerce expressed a similar intent of "removing those price *and nonprice controls* that remain in place following the partial wellhead decontrol carried out under the NGPA." [72] The Commission concludes that when gas is deregulated by the NGPA or the Natural Gas Wellhead Decontrol Act that gas and the producer-pipeline contract insofar as the contract covers deregulated gas rests outside the Commission's jurisdiction under the NGA.[73]

b. Jurisdictional Contracts. In Order No. 500–H, the Commission concluded that it would not take action under NGA section 5 to modify jurisdictional producer-pipeline contracts. After a full review of the record, including the data obtained through the Commission's Order No. 500 take-or-pay data request, the Commission concluded that section

[64] 26 FERC ¶ 61,379 at 61,843 n. 12 (1984).

[65] Northern Natural Gas Co., 44 FERC ¶ 61,384 (1988) (gathering) and Northwest Pipeline Corp., 49 FERC ¶ 61,072 (1989) (processing). AGD also refers to Northern Natural Gas Co., 43 FERC ¶ 61,473 (1988) for the same point.

[66] 26 FERC ¶ 61,379 at 61,843 n. 12 (1984).

[67] *See* Texas Gas Transmission Corp., 45 FERC ¶ 61,004 at p. 61,018–9 (1988).

[68] The Commission is referring to a prudence inquiry.

[69] Pub. L. No. 101–60, 103 Stat. 157 (1989).

[70] H. Rep. No. 101–29, 101st Cong., 1st Sess. at 4 (1989). S. Rep. No. 101–39, 101st Cong. 1st Sess. at 7 (1989).

[71] S. Rep. No. 101–39, 101st Cong., 1st Sess. at 10–11 (1989) (emphasis added).

[72] H. Rep. No. 101–29, 101st Cong., 1st Sess. at 2 (1989) (emphasis added).

[73] *See also* the floor discussion of the Wellhead Decontrol Act which indicates Congress' understanding that the NGPA had already eliminated the Commission's authority under NGA section 5 to modify take-or-pay clauses in contracts for the sale of new gas. For instance, Senator Metzenbaum proposed an amendment to the Wellhead Decontrol Act under which all take-or-pay clauses would "be held to be unjust and unreasonable under section 5 of the [NGA] unless the [FERC] finds, on application of a party to the contract, that the clause is just and reasonable under the particular circumstances of the contract in question." In opposing the amendment, Senator Johnston, the Committee Chairman and the floor manager of the Wellhead Decontrol Act, stated:

> This amendment would greatly expand FERC jurisdiction. Most wellhead natural gas contracts are already deregulated. Well over 60 percent are already deregulated. But what this amendment would do would bring those contracts to the extent they have take-or-pay obligations back under FERC jurisdiction, with I suppose blanket authority of FERC to reform the contracts in whichever way they wished, to rewrite the price or rewrite the quantity of take-or pay or indeed to declare the whole contract null and void.

135 Cong. Rec. S6520 (daily ed. June 13, 1989):

5 action would be ineffective or inequitable or both. The Commission stated that because the Commission lacks authority to modify contracts for the sale of non-jurisdictional gas, section 5 action would not bring about, and could discourage, the complete restructuring of all pipeline-producer contracts necessary to resolve fully the pipeline's take-or-pay problems and complete the transition to a competitive wellhead market. The Commission stated that reducing the take requirement would not by itself solve the problem because the pipeline would still take high price gas and so would be unable to compete with lower-priced spot gas. The Commission stated that the total elimination of the take requirement would mean that the producer no longer had contractual assurance of some minimum level of income and would be less willing to make concessions in connection with other contracts. The Commission noted other problems with taking section 5 action such as uneven impact, varying circumstances, and the reliance on contracts. Furthermore, the Commission found that pipelines have substantially resolved the bulk of their take-or-pay through individually negotiated settlements.

(i) *Petitioners' Contentions*—It is argued that the Commission, by not acting under section 5, has violated the *AGD II* mandate that it reach a "reasoned decision" about whether and to what extent take-or-pay provisions in contracts are unjust and unreasonable and has contravened section 5 which requires Commission action with respect to unlawful contracts. The petitioners further argue that the Commission may not, in its discretion, refuse to act on the grounds that action "would be ineffective and inequitable, or . . . the take-or-pay problem [is] largely resolved." [74] That is, the Commission must provide a remedy with respect to any unlawful contract.

The petitioners also contend that Commission action would be neither ineffective nor inequitable. First, they argue that Commission action would be effective for several reasons. They state that at the end of 1986 the pipeline's take-or-pay exposure with respect to jurisdictional gas amounted to $4.2 billion or 46 percent of the total exposure. The Public Utilities Commission of the State of California states that this includes high priced section 102(d) gas.[75] INGAA states that exposure at the end of September 30, 1989, for jurisdictional gas totalled 38 percent of total exposure.[76] A few petitioners state that there is exposure "yet to accrue." [77] The petitioners contend that it is not a reasoned response to state that action will not be taken against jurisdictional contracts because that action will not completely resolve the problem. They contend that while Commission action would not be a "panacea" it would improve pipeline bargaining power and result in better settlements for the pipelines.

The petitioners also contend that the Commission erred in determining that section 5 action would be inequitable. They state that generic Commission actions often are of uneven impact. The American Gas Association (AGA) adds that it is unlikely that a producer sells only jurisdictional gas. Moreover, they contend that the Commission has the wherewithal to deal with the equity concerns. For example, AGD states that the Commission could exclude from a finding of unreasonableness "any high take-or-pay provision accompanied by a sufficiently low price" [78] and could fashion remedial action that takes into account special circumstances and provide "producers some time to adjust to the new regime." [79] In addition, AGA contends that market-out clauses vitiate concerns about individual circumstances.[80]

The National Association of Gas Consumers (NAGC) contends that the Commission concerns about ensuring producers minimum levels of revenue are unfounded. The NAGC states that this is so because the "45.5% jurisdictional gas is essentially old gas discovered prior to the enactment of the NGPA." [81] It states that, therefore, "the investment [therein] was made at costs and prices far below today's market levels." [82] The NAGC adds that the producers benefited from excessive prices and so should bear the burden rather than the pipelines or the consumer.

Petitioners also contend that the Commission unlawfully relied on the interference with private contract rationale. They state that the Commission has read section 5 out of the statute and has ignored its consumer protection mandate. They argue that there is no right to rely on contracts entered into in with the understanding that they are subject to section 5 modification. They add that here changed circumstances justify intervention. For example, it is pointed out that the contracts were entered into a time of shortages which no longer exist and in an era of high NGPA prices. Last, they state that the Commission has acted with respect to contracts in the past. For example, they cite that the Commission eliminated variable cost minimum bills in Order No. 380 and required contract demand conversion rights in Orders No. 436/500.

Last, petitioners ask the Commission to strike take-or-pay provisions in whole or in part or to insert market-out provisions as of November 1, 1985.[83] Others request prospective action on the ground that any unresolved problems are the fault of recalcitrant producers. It is urged that the Commission strike the take-of-pay provisions, as it did minimum bills, because they are anticompetitive.

(ii) *Proportion of Gas Subject to Commission Jurisdiction.* Order No. 500–H stated that as of the end of 1986, approximately $4.2 billion of then existing take-of-pay exposure related to NGPA categories of gas subject to the Commission's jurisdiction. The $4.2 billion represented 45.5 percent of the total reported contract-by-contract take-or-pay exposure of $9.2 billion which the Commission was able to identify as relating to jurisdictional or nonjurisdictional gas.[84] The

[74] AGD's request for Rehearing at 27 is typical. Similarly, AGD states that "whatever 'policy' the Commission may have about maintaining the integrity of contracts is irrelevant to the Congressional command under section 5." *Id.* at 28.

[75] At the end of 1986, the price ceiling for section 102(d) gas was $4.431. This gas represented 18.5 percent of total take-or-pay exposure and about 40 percent of exposure with respect to jurisdictional gas. Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 100.

[76] Request for Rehearing at 7.

[77] *E.g.*, Florida Gas' Request for Rehearing at 4. Other pipelines refer to their individual take-or-pay circumstances.

[78] Request for Rehearing at 19, 20.

[79] *Id.* at 20.

[80] AGA states that: "The release of gas under such market-out clauses and open-access transportation would resolve the Commission's concerns regarding any adverse effects on smaller producers or the development of any production and operational constraints." Request for Rehearing at 7.

[81] Request for Rehearing at 8.

[82] *Id.*

[83] For example, the Public Service Commission of the State of New York asks the Commission to reduce take levels to 75 percent or to include market-out provisions effective as of the date of Order No. 436. This would not solve the overall problem which Order No. 500–H addresses because as there stated, the problem is that actual takes are at a 44 percent level.

[84] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 99. The total take-or-pay exposure in 1986 was $10.7 billion. The additional $1.5 billion represents take-of-pay exposure which was not identifiable as jurisdictional or nonjurisdictional.

Commission noted that of the $4.2 billion of take-or-pay exposure attributable to jurisdictional gas, $3.05 billion arose under contracts covering only jurisdictional gas and $1.15 billion arose under contracts covering both jurisdictional and nonjurisdictional gas totalling $2.57 billion in exposure.[85] The Commission stated that section 5 action could apply only to the $1.15 billion and not to the additional $1.42 billion in take-or-pay exposure under those contracts attributable to nonjurisdictional gas.

Order No. 500–H observed that in March, 1989, total take-or-pay liability was $2.4 billion, substantially less than the $4.2 billion year-end 1986 liability for just jurisdictional gas.[86] Similarly, the December 1989 INGAA sudy entitled "Take-or-Pay Exposure and Costs Through September 30, 1989" estimates that on September 30, 1989, the interstate pipelines' estimate of accumulated outstanding exposure amounted to $2.3 billion and that $0.9 billion of the $2.3 billion (38 percent) related to gas still under the Commission's jurisdiction. Hence, pipeline exposure with respect to jurisdictional gas has declined from $4.2 billion at the end of 1986 to $0.9 billion in September 1989, a total decline of $3.3 billion. In addition, pipeline exposure with respect to nonjurisdictional gas has declined during that time span from $5.0 billion to $1.4 billion, a total decline of $3.6 billion.

The Commission excluded nonjurisdictional gas included in contracts which cover both jurisdictional and nonjurisdictional gas because the NGPA removed nonjurisdictional gas from the Commission's NGA jurisdiction. The removal of the gas from the Commission's jurisdiction removed the contract from the Commission's jurisdiction as it relates to or affects that gas. The Commission has authority over the jurisdictional gas and the contract only to the extent of that gas. It is likely that the exposure with respect to jurisdictional gas has declined to less than the $0.9 billion as reported by INGAA because INGAA's respondents may have included all gas under a contract covering both jurisdictional and nonjurisdictional gas. This is because the "INGAA surveys did not provide guidance to the respondents with respect to whether gas should be classified as jurisdictional or nonjurisdictional when a contract contained both." [87] Indeed, this may explain why a previous INGAA study showed 64 percent of exposed gas as jurisdictional gas as of the end of 1986 as compared to the Commission's 45.5 percent determination. It is, therefore, probable that INGAA's estimate of $0.9 billion (38 percent) for exposure related to jurisdictional gas is overstated.

Two petitioners contend that the Commission erred in finding its NGA section 5 jurisdiction extended to only 45.5 percent of year-end 1986 take-or-pay exposure. They argue that the Commission has jurisdiction over nonjurisdictional gas covered by a contract that relates to nonjurisdictional and jurisdictional gas.[88] AGD cites *Fritz* v. *FERC*[89] for the proposition that the Commission retains "section 5 jurisdiction over all regulated gas *and* over all deregulated gas that is sold under a contract that covers any regulated gas." [90] And AGD states that, therefore, the Commission could reach $1.42 billion more in exposure, a total of 61 percent (excluding any section 109, 107(e)(5), and certain section 107 gas). *Fritz* involved a Commission regulation that prohibited any portion of the price for deregulated gas from representing consideration for the sale of regulated gas when the two types of gas are contractually coupled. *Fritz* described the Commission's authority as follows:

> FERC's responsibility to effectively enforce compliance with the NGPA price ceiling requires that when sales of regulated and deregulated gas are contractually coupled, FERC's jurisdiction extends to determining whether any portion of the price paid for deregulated gas influenced the price paid for regulated gas.[91]

Fritz stated only that the Commission's responsibility is to enforce the price ceilings of jurisdictional gas and does not stand for the proposition that the Commission has NGA jurisdiction over deregulated gas that is sold under a contract that also covers regulated gas. The Commission concludes for the reasons given above that it has no authority to take action with respect to contract provisions that affect nonjurisdictional gas even though those provisions are in contracts covering both jurisdictional and nonjurisdictional gas. The United Distribution Companies (UDC) claim that Commission modification of a contract provision in a partially jurisdictional contract will amend the provision for the nonjurisdictional gas in the contract. This, it states, will add $1.42 billion or 15 percent more to the total take-or-pay exposure. Because, as stated above, the Commission's jurisdiction is limited to the jurisdictional gas, the Commission concludes that Commission modification of a contract provision in a partially jurisdictional contract will not amend the provision for the nonjurisdictional contract.

(iii) *Discussion.* The *AGD I* court directed the Commission to reassess its decision in Order No. 436 not to invoke its power under NGA section 5 to modify or set aside troublesome take-or-pay provisions in jurisdictional contracts.[92] The *AGA* court emphasized that the Commission must provide a reasoned basis for a decision that it is not necessary to take action pursuant to section 5.[93] In order No. 500–H, the Commission set forth its reasons for not invoking section 5.[94] In brief, the Commission concluded that policy consideration militated against section 5 intervention against jurisdictional producer-pipeline contracts. The Commission emphasized that such action would be "ineffective or inequitable or both" and that such limited action could not bring about and could discourage a complete resolution of the take-or-pay problems.[95] As described above, the petitioners disagree. They believe that section 5 action would be a useful tool in resolving the take-or-pay problem.

The issue before the Commission is whether to proceed with open-access without invoking NGA section 5 to set aside jurisdictional producer-pipeline contracts to resolve the take-or-pay problem of the natural gas industry. The Commission's conclusion in Order No.

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[85] *Id.* at 100 n.151.

[86] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 101 INGAA has updated the $2.4 to $2.7 in its December, 1989 study.

[87] Take-or-Pay Exposure and Costs Through September 30, 1989 at 3 n. 14.

[88] AGD also argues that the Commission erroneously excluded jurisdictional exposure attributable to NGPA sections 109, 107(c)(5) and 108 (some) to the extent of $0.8 billion. This would provide a total of $5.0 billion or 54 percent of the total exposure. The Commission agrees that an additional $137 million or 1.5 percent could be assigned to the jurisdictional category. See Appendix A for an analysis. AGD also argues that the Commission erred in not analyzing take-or-pay as of "October 1985, when Order No. 436 issued and when the proportion of jurisdictional gas is likely to have been larger." Request for Rehearing at 16. The Commission used data as of the end of 1986 because that was the first full calendar year that Order No. 436 was in effect.

[89] 876 F.2d 1224 (5th Cir. 1989).

[90] Request for Rehearing at 17.

[91] 876 F.2d 1224, 1128 (5th Cir. 1989).

[92] 824 F.2d 981 at 1028.

[93] 888 F.2d 136 at 148.

[94] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 99–114.

[95] *Id.* at 4. ("Because the Commission's section 5 authority is limited, section 5 action could not bring about and could discourage, the complete restructuring of all pipeline-producer contracts necessary to resolve fully the pipeline's take-or-pay problems and complete the transition to a competitive wellhead market.")

500–H not to invoke section 5 was based on a balancing of all the factors to reach a decision about whether section 5 should be invoked to seek a resolution of the take-or-pay problem.[96] However, it is an industry-wide problem, involving both jurisdictional and nonjurisdictional gas in the context of a general policy of open-access transportation, that must be resolved. The Commission's focus is broad and not narrow. It is a comprehensive solution that is needed and not just a solution aimed at jurisdictional gas. It is in that light that the facts (both for and against invoking section 5) must be weighed.[97]

Many of the petitioners' contentions are not, standing alone, completely inaccurate. For instance, in narrow circumstances, the Commission has in the past invoked and taken section 5 action against contracts. In addition, such action may have had an uneven impact and, of course, the Commission has the ability to deal with equity concerns. Further, producers benefited at least temporarily from high prices in the years immediately following passage of the NGPA.[98] But so did LDCs and consumers as the shortages that plagued the 1970's came to an end. Last, action taken against jurisdictional contracts (if they are unlawful in whole or in part) could give a degree of take-or-pay relief to those contracts.

The Commission has considered the above points [99] as well as the equities raised by the *AGD I* court.[100] But the Commission differs with petitioners on the efficacy of initiating action under section 5 with respect to jurisdictional contracts to comprehensively resolve the industry's take-or-pay problems. In the Commission's judgment, what is needed is a policy that will enable the industry to address jurisdictional and nonjurisdictional contracts in a manner that comports with Congress' goals in deregulating gas, and that is at the same time equitable to all participants in the natural gas industry. In the Commission's judgment, Order No. 500–H provides a workable overall policy that meets these aims so that section 5 need not be invoked. The Commission considers unilateral contract abrogation in whole or in part to be an extreme measure that is unnecessary particularly in light of the contract reformation that has already taken place. If the Commission were to invoke section 5, it must not only find the take-or-pay provisions unjust and reasonable, but must thereafter specify the just and reasonable provisions to be observed. But the industry has just gone through the process of getting the government out of controlling wellhead contracts. What is there to give confidence that the government controls that brought low prices and shortages during the 1970's and high and increasing prices in the early 1980's will be any more effective at specifying the "right" provisions or controls for the 1990's? The parties are in a much better place themselves to refashion their contractual and commercial relationships. Indeed, producers and pipelines have agreed to contract reformations that have significantly reduced pipeline exposure for breach of contract. The Commission believes that its Order No. 500 crediting policy has helped enable those contract reformations. Pipelines have settled with their customers and state agencies in a manner where the pipeline absorbs some of the settlement costs in return for direct billing. This helps both the pipelines by assuring some recovery and the consumer by reducing their contribution.

In the Commission's judgment, it would be imprudent to change the current policy based on the supposition that section 5 action would produce better overall results. There is no reason to believe that. The take-or-pay problem is associated with all contracts, jurisdictional and nonjurisdictional. The Commission could reach (in some fashion) jurisdictional contracts. The Commission's judgment is that a better overall resolution of the take-or-pay problem would result if all problem contracts are placed on the negotiating table to be dealt with by the parties than if the Commission dictates results as to a portion of the contracts and leaves the others untouched. The Commission believes it unlikely that action under section 5 would achieve results more favorable to pipelines. Section 5 action would likely undo the existing settlements involving both jurisdictional and nonjurisdictional contracts. Negotiation would have to begin new as to nonjurisdictional contracts. Producers would likely try to bargain with respect to the nonjurisdictional contracts to end up with an overall resolution no less beneficial to the producers than what they have at present. Moreover, it is no reason to upset the instant policy on the ground that there may be better overall results when current contract reformations are in the public interest. In this vein, the Commission refers to INGAA's study that shows only $0.9 billion in current exposure with respect to jurisdictional gas at the end of September, 1989, as compared to $4.2 billion at the end of 1986. Exposure with respect to nonjurisdictional gas declined from $5.0 billion to $1.4 billion over the same time frame. The Commission has no way of knowing at this time whether invoking section 5 with respect to jurisdictional gas would result in a better solution to the take-or-pay problem than the numbers show for today. However, based on the cited numbers and its own judgment and expertise, the Commission believes, for the reasons stated in Order No. 500–H, that the Order No. 500–H vehicle will more likely result in a better overall resolution of the take-or-pay problem without further investigation under section 5.[101]

Last, the Commission will address petitioners' contention that the Commission should take generic action here as it did in Order No. 380 with respect to variable cost minimum bills and declare jurisdictional take-or-pay provisions unjust and unreasonable on the ground that they are anticompetitive.[102] There are significant differences between the circumstances of Order No. 380 and the circumstances here. First, Order No. 380's purpose was

[96] *Id.* at 4, 5. ("Accordingly, since pipelines have substantially resolved the bulk of their take-or-pay problems through individually negotiated settlements and since the provisions of the final rule discussed above should enable pipelines to settle the remainder of their take-or-pay problems, the Commission will not take section 5 action.")

[97] The Commission did state that it could not find all minimum take provisions regardless of the level unjust and unreasonable because of the need to assure producers of some level of income as intended by the original producer-pipeline bargain. (*Id.* at 104) The Commission reaffirms this statement about not taking drastic action against any take requirement but clarifies that this concern about assuring producers some level of income was a factor in not invoking section 5 and not a merits finding with respect to the lawfulness of particular take-or-pay provisions.

[98] However, as stated in Order No. 500–H, producers made substantial investments in reliance on these high prices and have been harmed by the reduced demand for gas and resultant lower market prices which followed the surge in prices immediately after enactment of the NGPA. Accordingly, the insertion of market-out clauses as urged by the AGA might adversely affect some producers.

[99] The NAGC questions the Commission's rationale of assuring producers some level of income by stating that much of the regulated gas is essentially low cost gas (below 90 cents), which current market prices would easily cover. Even assuming that low cost gas is significant in amount, that gas' take amount would not be combined with high NGPA prices and hence would not be a problem. In any event, the NAGC has ignored section 102(d) gas. *Id.* at 100.

[100] 824 F.2d 981 at 1026–27.

[101] What petitioners fail to appreciate is that Congress has entrusted and delegated to the Commission the authority to determine whether action should be taken under section 5 consistent with the public interest based upon its expertise and judgment concerning the natural gas industry.

[102] *E.g.*, Panhandle Eastern Pipe Line Company's (Panhandle) Request for Rehearing at 9. Panhandle refers to contracts that have not been renegotiated.

to promote price competition among pipelines in the sale of gas.[103] Here, Congress has found that the wellhead market is workably competitive.[104] Hence, there is not the same need to promote price competition among producers. Further, the magnitude of the problems differ. The Commission had jurisdiction over all interstate pipelines and their contracts with LDCs and could bring about a total solution to the variable cost minimum bill problem. Here, the Commission has jurisdiction over only some of the problem take-or-pay contracts. Similarly, variable cost minimum bills covered a significant amount of pipeline gas.[105] Here, problem jurisdictional contracts cover a much smaller proportion of producer take-or-pay gas.[106] In short, Order No. 380 resolved the variable cost minimum bill problems.[107] Section 5 action in this context will not solve the total take-or-pay problem and in the Commission's judgment will discourage the necessary complete restructuring of all pipeline-producer contracts.

B. Equitable Sharing

1. Passthrough Mechanisms

Order No. 500–H did not change the two mechanisms for passing through take-or-pay settlement costs approved in the Order No. 500 policy statement. The first or traditional method is recovery through commodity sales rates. The second or equitable sharing mechanism is an alternative to the first. Under it, if a pipeline is willing to absorb from 25 to 50 percent of its take-or-pay settlement costs, then it will be allowed to recover, through a fixed charge, an amount equal to the percentage it is willing to absorb. The remainder may be recovered through a volumetric surcharge on all throughput. The fixed charge is to be determined by the purchase deficiency allocation mechanism described below in the next subsection.

[103] Wisconsin Gas Co. v. FERC, 770 F.2d 1144, 1157 (D.C. Cir. 1985). *See also*, Order No. 500–H, 49 FERC ¶61,395, slip op. at 13–15.

[104] *See* Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, [Reg. Preambles 1982–1985] ¶30,665 at p. 31,482 (1985) and S. Rep. No. 39, 101st Cong. 1st Sess. 3 (1989) ("While partial wellhead decontrol under the NGPA has helped to create an environment in which competition, not public utility-type regulation, is the dominant force in determining prices and supplies in the natural gas sales markets. . . .")

[105] Wisconsin Gas Co. v. FERC, 770 F.2d 1144, 1150 (D.C. Cir. 1985) ("sixty-six to ninety percent" of CD).

[106] In 1986, jurisdictional gas with very high prices was less than 20 percent. 49 FERC ¶61,325, slip op. at 100 (NGPA Sections 102(d) and 108 gas).

[107] In addition, pipelines retained their CD protection to cover a significant amount of fixed costs.

a. AGD II. The Commission's equitable sharing policy permitted a pipeline to recover through a fixed charge an amount equal to the percentage (25 to 50 percent) it is willing to absorb of take-or-pay settlement costs. Section 2.104 of the Commission's regulations announced the policy that the pipeline should compute the fixed charge using a purchase deficiency allocation mechanism under which a customer's purchase deficiency was to be determined by comparing the customer's purchases in recent years during which the pipeline incurred take-or-pay liabilities with the customer's purchases during a representative period when take-or-pay liabilities were not incurred. Each customer's charge would be based on its deficiencies as compared to total deficiencies. In *AGD II*, the court concluded that the purchase deficiency allocation mechanism is unlawful because it violates the filed rate doctrine. The Commission is filing a petition with the D.C. Circuit for rehearing and rehearing *en banc*.

b. *Petitioners' Contentions.* Petitioners object to Order No. 500–H's passthrough mechanisms on a variety of grounds. Some pipelines argue that the alternative, equitable sharing mechanism is unlawful because it denies them the opportunity of recovering prudently incurred costs owing to the absorption requirement.[108] They contend that because the traditional method of volumetric recovery in the sales charge is illusory, the alternative method is not really voluntary.

On the other hand, AGD and NAGC contend that the Commission should have required pipelines and producers to absorb a greater portion of the take-or-pay costs. AGD contends that the Commission's equitable sharing policy fails to take into account the effect of LDCs and their captive customers of pre- 11/1/85 discrimination in pricing by pipelines between industrials (low prices) and LDCs (high prices) and of post 11/1/85 high WACOGs and on non-cash payments erroneously included in the formula. Along similar lines, NAGC contends that the Commission's equitable sharing policy fails to take into account the alleged windfall to producers resulting from increased prices under the NGPA and high rates of return allowed pipelines during the 1970's to compensate then for high levels of risk.

[108] Florida Gas Transmission Company (Florida Gas) and Northern Natural Gas Company argue that there is no support for the 25–50 split and Florida Gas contends that non-open access pipelines should also be able to direct bill their settlement costs.

Baltimore Gas and Electric Company (BG&E) states that equitable sharing should be jettisoned as unlawful. It states that there was no reasonable opportunity to contest prudence in light of what it considers to be a punitive policy for doing that and the reversal of the burden of proof. BG&E states that pipelines should be allowed to recover 100 percent of their prudently incurred costs. It also states that the presumption of prudence with respect to contract reformation should not make the original take-or-pay incurrence prudent.

Several petitioners suggest other methods of recovery and argue that *AGD II* makes any formula for determining charges which is based on the past unlawful. Florida Gas argues that a pipeline should be able to make recovery through both its sales and transportation charges regardless of whether it pursues the demand charge alternative method. Several LDCs and others[109] argue that in light of the *AGD II* decision allowable costs should be recovered through a 100 percent volumetric charge to all customers.[110] Some pipelines and the Producer Associations suggest 100 percent direct billing of recoverable costs. Texaco, Inc., *et al.*, (Texaco) asks the Commission to preserve the equitable sharing policy by using current contract sales entitlements for the direct bill.[111] The Iowa State Utilities Board and The State of Michigan and the Michigan Public Service Commission request the Commission to act through a notice of some sort whether rulemaking or inquiry. Columbia Gas Transmission Corporation asks the Commission to reject the cumulative purchase deficiency allocation in light of *AGD II*, to issue an NOI with respect to the appropriate mechanism, and to stay all direct billing based on deficiencies pending the establishment of a new mechanism. Other petitioners such as BG&E also asked for a halt to the "unlawful" method. Inland Gas Company, Inc., wants the *AGD II* reversal considered in Tennessee's dockets with only an interim allocation here, either prospective CD and/or annual purchase entitlement levels, or

[109] *E.g.*, the Ohio Consumers' Counsel and the American Public Gas Association.

[110] Sun Refining and Marketing Company argues that a shipper under a section 7 certificate that preceded Order No. 436 should not be subject to a volumetric surcharge.

[111] Texaco also suggests an alternative with the achieving of equitable sharing "by a fixed cost minimum commodity bill set to recover only the costs to be shared by the sales customers and the pipeline." Request for Clarification or Reconsideration at 4.

prospective units of usage.[112] The Northern Illinois Gas Company wants the pipelines to reaffirm equitable sharing or have their direct billing plans terminated pending future Commission action.[113]

c. *Discussion.* The Commission continues to believe that the purchase deficiency allocation method should be used for the passthrough of take-or-pay costs and will seek to change the result of the *AGD II* decision. The Commission is therefore filing a petition with the D.C. Circuit for rehearing and rehearing *en banc.* Hence, the Commission will not now modify its passthrough policy statement or stay pipelines' collection of fixed take-or-pay charges.[114]

The Commission continues to believe that purchase deficiency allocation is the most equitable method for allocating the take-or-pay costs included in the fixed take-or-pay charge among pipeline customers because that method, while not perfect, most closely matches cost causation with cost incurrence. The pipelines entered into the take-or-pay contracts to serve their firm customers' anticipated demands for gas. Accordingly, those customers' subsequent reduced demands for gas have caused the incurrence of the pipelines' take-or-pay costs.[115] Other potential allocation methods do not match cost causation with cost incurrence as well as the purchase deficiency method because they are related solely to current demand levels or purchases and shipments of gas.

Appendix B illustrates the effects on selected pipelines of two alternate allocation methods commonly mentioned by rehearing applicants. Appendix B shows, for example, that, under these alternative methods, purchasers that significantly reduced purchases from their pipeline suppliers, thereby causing the incurrence of these costs, will in some cases bear a significantly smaller proportion of these costs than under the purchase deficiency methodolgy. The costs borne by these customers under the purchase deficiency allocation would instead be shifted to other customers, including in a number of cases captive customers.

Last, the *AGD II* decision was limited to the lawfulness of the purchase deficiency allocation method and, therefore, does not affect the other matters considered in the Final Rule such as whether to invoke NGA section 5 with respect to jurisdictional contracts.

The petitioners' arguments that pipelines using the alternative passthrough mechanism should not be required to absorb costs do not warrant modification of the equitable sharing policy. For the reasons stated in Order No. 500–H, the Commission continues to believe that the requirement that pipelines absorb a portion of their costs in return for the right to guaranteed recovery of costs in a fixed charge is appropriate.[116] The Commission believes that individual pipeline contentions are more appropriately addressed in connection with filings by those pipelines.[117] The Commission notes that in *ANR Pipeline Co.* the Commission rejected ANR's proposal for 100 percent recovery of its take-or-pay costs through a direct charge [118] and that rehearing is pending.

The Commission also rejects AGD and NAGC's contentions that pipelines should be required to absorb a greater proportion of their costs. The distortions in the natural gas market, originally brought on by the regulatory policies of the early 1970's while holding the price of gas at artificially low levels,[119] have both benefitted and adversely affected each segment of the industry at different times. While AGD points to costs LDCs and their customers have borne during the early and mid 1980's, it overlooks the fact that LDCs also benefitted from the artificially low prices during the 1970's. Overall, however, the Commission believes the market distortions described in Order No. 500–H have harmed all segments of the natural gas industry. Producers have suffered from boom and bust cycles which encouraged them to develop expensive sources of supply for which there was later no market. Pipelines have incurred take-or-pay and other costs. Furthermore, the Commission believes that all segments of the industry will benefit from the transition to a competitive natural gas market made possible by open access transportation. That LDCs and their customers benefit is shown by the AGA study described in Order No. 500–H. That study found, based on a survey of 55 LDCs reported in September 1989,[120] that the average cost of 100 Mcf of gas to residential customers fell by $64 between 1984 and 1988 (from $594 to $530) as a result of LDC spot purchases of gas under the open access program. By contrast the study found, assuming the average U.S. residential gas heating customers uses 100 Mcf annually, most LDCs will charge those customers less than $11 a year in take-or-pay costs. No rehearing applicant has challenged the accuracy of this AGA study.

In conclusion, the natural gas industry is in a time of major change owing to the fundamental changes made by Congress in the way prices are determined in the wellhead markets. The Commission and the natural gas industry must steer through this transition period from the old environment to the new reality. The contracts at issue stem from the earliest time, and they must be renegotiated to reflect the new conditions. However, this transition, to realize the benefits of a competitive wellhead market, will entail some costs. The benefits are those that are fundamental to the Natural Gas Act: sufficient supplies at a reasonable price. Congress has determined that competitive wellhead markets are the best way to accomplish that. All segments of the natural gas industry (producers, pipelines, LDCs and consumers) will benefit from the change from the old way of doing business to the new. The Commission believes that the equitable sharing mechanism which seeks to spread the costs of the transition widely is the best means of travelling from the old environment to the new era.

2. Sunset Date

Order No. 500–H modified the policy statement by extending the March 31, 1989 sunset date for the alternative, equitable sharing mechanism until December 31, 1990, with the exception that if the D.C. Circuit has not completed judicial review of the final rule by that date, the Commission will further extend the sunset date until 30 days after the D.C. Circuit issues its mandate on review of the final rule. However, the Commission did not extend the sunset date for the litigation exception of Order No. 500–F. This means that "after December 31, 1990, pipelines will be permitted to use the alternative mechanism to recover only eligible costs

[112] *AGD II* involved Tennessee's equitable sharing mechanism.

[113] A number of rehearing applicants raise issues concerning the application of the Commission's passthrough policy to their particular situations. *See, e.g.,* rehearing request of Arkla. These issues are more appropriately addressed in individual cases applying the passthrough policy.

[114] Several petitioners filed answers in opposition to the motions for a stay or suspension of purchase deficiency direct billing.

[115] The Commission recognizes that reformations of the contract terms to be in effect in the future benefit all customers regardless of their purchase deficiencies. However, these contract reformations, including reductions in future take requirements, are made necessary by the fact that the pipelines' customers as of the date the contracts were entered into have reduced their purchases and are not expected to increase them in the future.

[116] 49 FERC ¶ 61,325, *slip op.* at 197, 198.

[117] *E.g.,* Northern Natural Gas Co., 49 FERC ¶ 61,437 (1989).

[118] 49 FERC ¶ 61,439 (1989).

[119] *See* Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 9, 10.

[120] State Treatment of Take-or-Pay Settlement Costs, 17 Gas Energy Review 2 (September 1989).

arising under contracts which were in litigation on March 31, 1989." [121]

The Commission also addressed the issue of the relationship between a rejected proposal and judicial review as follows:

> In *AGA*, the court also expressed concern that, if the Commission decides to impose a deadline calculated to fall sometime after judicial review, "pipelines will still be unable to appeal Commission decisions rejecting their take-or-pay passthrough proposals because review will come after the new filing deadline." A sunset date after judicial review of the final rule would only affect a pipeline's ability to appeal the rejection of a take-or-pay filing if: (1) the Commission rejects a pipeline's filing to recover take-or-pay settlement costs, (2) the pipeline seeks judicial review of the rejection and does not make a new filing consistent with the Commission's policies, and (3) following the sunset date the court upholds the Commission's rejection of the filing.
>
> To date, every pipeline that has had a proposal to recover take-or-pay costs rejected has made a subsequent filing which the Commission has accepted. Thus, the circumstances about which the court expressed concern have not yet arisen. However, if the circumstance arises that was of concern to the court, the Commission will then consider what steps, if any, to take in light of the concerns expressed by the court.[122]

a. *Petitioners' Contentions.* The pipelines argue that there should be no sunset date. They state that the take-or-pay problem is going to continue and argue that a sunset date hurts their bargaining positions as shown by the increase in out-of-pocket expenditures. Panhandle contends that the only fair sunset date is the date a GIC is implemented. Southern Natural Gas Company argues that the Order No. 500–H sunset date should not prevent filings to recover the costs of resolving royalty claims with respect to take-or-pay agreements negotiated on or before the sunset date. In addition, several pipelines content that the litigation exception should be extended to December 31, 1990 or eliminated to increase bargaining power. Natural Gas Pipeline Company of America contends that the Commission did not meet the *AGA* requirement that the Commission justify a deadline to overcome the court's concern about pipelines that appeal the Commission's rejection of non-Order No. 500–H proposals with court review thereof after the sunset date. ANR Pipeline Company (ANR) argues that not allowing an unsuccessful appellant to use Order No. 500–H procedures is punitive and unlawful and should be disavowed. ANR also seeks clarification of "new filing".[123] It asks whether "new filing" means that during an appeal of the rejection of 100 percent direct method, a pipeline may use the 500–H method and, if not, what does it mean?

The American Gas Association argues that greater certainty is needed with respect to the sunset date extension; for example, it urges an automatic extension to be triggered on some date in November, 1990 if the court has not acted by that date.

b. *Discussion.* The Commission concludes that the petitioners have raised no arguments that warrant modification of Order No. 500–H's sunset date. The December 31, 1990, date, coupled with the exception that if the D.C. Circuit has not completed judicial review of the final rule by that date the Commission will further extend the sunset date until 30 days after the D.C. Circuit issues its mandate on review of the final rule, comports with the *AGA* decision that no deadline be imposed until after judicial review of Order No. 500–H.[124]

With respect to ANR's petition, the Commission clarifies that "new filing" refers to a filing comporting with the Commission's policy where judicial review of a prior rejected filing has not been sought. A pipeline may not use the Order 500–H mechanism while it appeals rejection of the 100 percent direct billing method. In light of the court's concerns, the Commission will address the circumstance of the final rejection of a non-conforming method and future use of equitable sharing if that circumstance arises. Transwestern Pipeline Company (Transwestern) questions the GIC provision that provides that the "pipeline may not recover take-or-pay or similar charges from suppliers by any other means." [125] Transwestern argues that this provision creates a deadline on its using "the 'equitable sharing' mechanism and must be removed to bring Order No. 500–H in compliance with the *AGA* mandate." [126] Transwestern contends that the Commission "must not treat GIC pipelines any differently than other pipelines with respect to deadlines on cost recovery opportunities." [127] It requests rescission or at least deferral of the provision until after it "has an opportunity to file for full recovery of its costs and seek review of any denial of such a filing." [128] *AGA's* requirement that the sunset date be extended does not apply to the situation where a pipeline accepts a certificate for a GIC because it is the pipeline's own volitional act that precluded recovery of take-or-pay costs through another method. This is necessary to prevent double recovery of costs.[129] Transwestern's problems are unique in that it has no sales customers under its GIC because its primary sales customer, Southern California Gas Company, chose to convert 100 percent of its entitlement to transportation when the GIC was implemented. These problems should be raised in a Transwestern proceeding so that all interested parties will be able to voice their views.

The Commission also denies rehearing with respect to the litigation exception for the reasons given in Order 500–H.[130]

3. State Action

Order No. 500–H addressed the role of state regulators in implementing the Commission's view that "there should be an equitable sharing of take-or-pay costs among *all* segments of the industry." [131] The Commission suggested that state regulators consider reclassifying costs directly billed to LDCs to the commodity charge (sales or transportation) or implement an equitable sharing mechanism at the state level where LDCs would absorb a portion of the costs if they desire to assess a fixed charge. In addition, the Commission stated that state regulators may review the prudence of LDC purchasing decisions insofar as they affect take-or-pay costs. The Commission stressed that the above were its views and that it "in no way intends to trespass on the states' rights to determine whether, how, and to what extent to exercise the authority which the states retain." [132]

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[121] 49 FERC ¶ 61,325, slip op. at 73. In other words, cost recovery for contracts in litigation by March 31, 1989 can be sought at the natural conclusion of the proceeding, whenever that may be.

[122] *Id.* at 73, 74 (footnotes omitted).

[123] See p. 91, *supra*.

[124] As requested by CNG Transmission Corporation, the Commission clarifies that the issue of whether Tennessee Gas Pipeline Company is entitled to a sunset date extension in light of its take-or-pay settlement may be considered in a Tennessee proceeding.

[125] 18 CFR 2.105 (a) (1989).

[126] Request for Rehearing at 14.

[127] *Id.* at 15, 16.

[128] *Id.* at 16.

[129] *See* the discussion in Transwestern Pipeline Co., 44 FERC ¶ 61,164 at p. 61,535 (1988), *appeal docketed*, No. 88–1046 (D.C. Cir.), on coordinating recovery under the alternative passthrough mechanism and through a GIC mechanism.

[130] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 77, 81.

[131] *Id.* at 200.

[132] *Id.* at 203.

a. *Petitioners' Contentions.* Numerous LDCs ask the Commission to withdraw what they argue was gratuitous dicta about the authority of state agencies with respect to take-or-pay settlement costs flowed through to consumers.[133] They also claim that the "prudence" discussion is erroneous.

b. *Discussion.* The Commission concludes that the petitioners have raised no arguments that warrant modification of the Commission's discussion of the role of state regulators.

C. Gas Inventory Charge

In Order No. 500–H, the Commission reaffirmed its commitment to implement GICs as speedily as possible and retained the principles set forth in section 2.105 of the regulations without change. The Commission stated that further refinements to its GIC policy should be developed on a case-by-case rather than on a generic basis. The Commission retained the principles set forth in section 2.105 of the regulations without change because (1) the Commission is not yet certain what all the necessary elements of a properly structured GIC should be for specific situations beyond the general criteria originally laid out in Order No. 500; (2) the record was not adequate for the development of a permanent GIC policy; (3) the processing and implementation of GICs on a case-by-case basis is going forward without the need for additional generic principles; and (4) factual circumstances vary from pipeline to pipeline. The Commission denies the requests for rehearing of Order No. 500–H for these same reasons.

On rehearing, Transwestern argues that a GIC denies pipelines a reasonable opportunity to recover prudently incurred costs. Wilcox argues that, because the pipeline cannot adequately recover take-or-pay costs, the pipeline will no longer maintain a gas supply for the portion of firm certificated sales requirements not nominated for GIC service. The Producer Associations argue that the Commission should incorporate into the final GIC policy statement provisions which require that (1) transportation and sales service be comparable; (2) GIC pipelines be subject to a triennial section 4 rate review; (3) each GIC certificate be conditioned to set a floor on the commodity charge equal to the weighted average of the lesser of the contract price or the NGPA ceiling price for its gas portfolio; (4) market-indexed GICs not be a basis for abrogation of or interference with the pipeline's contracts with its existing producers; (5) GICs contain a reconciliation mechanism to prevent pipelines from charging non-cost based rates; and (6) the must-take gas commitments of GIC pipelines be considered when setting a floor for GIC volumetric nominations.

In addition, the United Distribution Companies argue that when pipeline customers are required to pay for the maintenance of their nominated gas requirements, the pipeline must warrant that it will have those supplies when needed. Wilcox argues that the Commission should require pipelines which offer a GIC service to customers who convert to firm transportation to also offer such GIC service to customers which wish to remain sales customers and pay the same GIC charges as converting customers. Wilcox also maintains that the Commission should define a customer's current level of service for the purposes of section 2.105 as the customer's currently certificated maximum sales delivery rights. Michigan argues that any abandonment of gas supplies associated with a GIC should be on a seasonal rather than a monthly basis.

The Commission will not modify the GIC policy statement on rehearing. Section 2.105 is only a general statement of policy which establishes the bare outline of a GIC. That policy statement will be further developed within the context of particular cases. The Commission's policy with regard to GICs is still evolving as the Commission and the industry gain experience with the issues associated with GICs. The Commission also would note that the Commission more recently has adopted, on a case-by-case basis, features which are responsive, in whole or in part, to the arguments of the Producer Associations, United Distribution Companies, Wilcox, and Michigan.[134] Nevertheless, the specific issues raised on rehearing can be addressed more effectively in individual GIC proceedings.

The Producer Associations also argue that prior to adopting a final statement of policy regarding GICs, the Commission must first consider the public comments filed in Docket No. PL 89–1–000. The Commission rejects this argument since it is based on an erroneous premise—that this order constitutes a final statement of policy regarding GICs. As stated previously, the Commission's policy is evolving although the Commission does not believe the broad outline of that policy established in Order No. 500 needs to be modified at this time.

D. Contract Demand Reductions

In Order No. 500–H, the Commission stated that the objectives of the CD reduction option are still valid. However, the Commission decided not to restore the CD reduction option generically in the final rule because the CD reduction issue is being addressed in individual pipeline cases where the Commission has a better opportunity to assess the impact of the CD reductions that concerned the court in *AGD I.*

1. Generic CD Reductions

The state of Michigan argues that the Commission should restore the CD reduction rule generically. It argues that CD reduction was an essential part of the balance of equities in Order No. 436 because it allowed pipeline customers to take advantage of open access transportation options by adjusting their contract demands and freeing up firm transportation capacity to serve themselves and others. Michigan also claims that it is erroneous for the Commission to suggest that it is not necessary to implement CD reduction generically because the Commission is addressing the issue in individual pipeline cases. Michigan claims that many LDC-pipeline contracts will have expired before the Commission decides these cases.

Michigan Consolidated Gas Company (Mich Con) also requests that the Commission reinstate CD reductions generically. It claims CD reductions are essential because LDCs no longer need the contract demand that they had previously obtained to serve industrial end users, current contract demands do not reflect market realities, CD reductions will promote operational and fixed-cost efficiency among pipelines, and CD reductions are essential to ensure efficient markets and least-cost purchasing practices by LDCs. Mich Con argues that the Commission's reliance on pipeline rate cases amounts to inaction when the Commission iteself recognizes that a serious situation exists that is unjust and reasonable and that inhibits the Commission's stated goal of promoting efficient markets.

The Process Gas Group argues that by deferring CD reductions to future proceedings for resolution on a case-by-case basis, the Commission has unnecessarily delayed the benefits of true open access service for many

[133] It is interesting to note that many LDCs make this argument while continuing to press the Commission to invoke section 5 against the pipeline-producer contracts.

[134] Transcontinental Gas Pipe Line Corporation, 48 FERC ¶ 61,399 (1989); Columbia Gas Transmission Corporation, 49 FERC ¶ 61,071 (1989); El Paso Natural Gas Company, 49 FERC ¶ 61,262 (1989).

customers. It maintains that concerns about cost shifting can be fully accommodated by limiting CD reductions to situations where another party is willing to contract for the release capacity. In a variation of this proposal, NI–Gas argues that a pipeline should be required to poll its existing firm customers whenever it has unsatisfied request for firm capacity. It believes that the pipeline should be required to accept a contract demand turnback when the new customer agrees to a rate at least equal to the old customer's rate and a contract term at least as long as the old customer's remaining contract term, conditions which the Commission has imposed on project-financed piplines. The Process Gas Group alleges that the Commission could minimize potential harm to pipelines and their customers if CD reduction rights are capped, if CD reductions are spread out over time, and if pipelines are required to prove that facilities are used and useful before rate increases are authorized.

The Process Gas Group also argues that the voluntary CD reduction measures are ineffective because of timing differences, *i.e.*, customers may be unwilling to give up capacity on one pipeline unless access to capacity can be assured on another. In addition, it alleges that CD reductions may be delayed by years by voluntary negotiations.

United Cities Gas Company also believes that the Commission should have reinstated the CD reduction provisions contained in Order No. 436. United Cities argue that case-by-case determinations are too uncertain and that settlements put the customers in the position of having to negotiate for that to which they are lawfully entitled in the first place. It maintains that, given its stated commitment to the goal of CD reductions, the Commission should have attempted to gather additional record support through public inquiries since *AGD I* was issued, and to tailor a generic CD reduction rule to fit at least certain classes of customers, as the court invited it to do in *AGD I*.

On rehearing, the Commission affirms its decision not to restore the CD reduction option generically. No party, including Michigan, Mich Con, and the Process Gas Group, has suggested a workable method of restoring the CD reduction option generically in a way which addresses the *AGD I* court's concerns with cost shifting. A particular cap on CD reduction rights, or a particular schedule for the exercise of those rights, two methodologies suggested by the Process Gas Group, may be appropriate for one pipeline but may be too inflexible for another pipeline and may result in excessive cost shifting on a third. In these circumstances a case-by-case methodology is preferable.

Nor has any party, including Michigan, Process Gas and United Cities, indicated why the goals of CD reductions cannot be obtained through a case-by-case methodology—whether in GIC or rate design proceedings. Contrary to Michigan's argument, the fact that some LDC-pipeline contracts may have expired before the Commission decides the issue is not a reason to require CD reductions generically. Outside of the context of CD conversions, a pipeline is required to provide sales service after the expiration of the contract until it obtains from the Commission authorization to abandon the service. On the other hand, if a pipeline's non-jurisdictional customer does not wish to purchase a service from the pipeline, all it needs to do is refrain from executing a new contract with the pipeline. In addition, interested parties may raise CD reduction proposals in the context of any general rate case proceeding and the Commission will address that issue together with other rate case issues regardless of when sales contracts may expire on the pipeline system.[135] Further, parties may agree to CD reduction settlements which may be separately presented to the Commission at any time regardless of when contracts expire. Such settlements are particularly suitable where another party is willing to contract for the release capacity, a scenario posed by the Process Gas Group and NI-Gas, since no party would be harmed by the CD transfer and no party would have an incentive to object to it.

The Process Gas Group also argues that a problem may exist with a case-by-case approach because of timing differences concerning the implementation of CD adjustments on different pipeline systems. However, the Process Gas Group provides no indication of how widespread this problem is, if it exists at all, nor does it indicate why contracts including the appropriate contingency clauses would not sufficiently alleviate this problem. In addition, the Process Gas Group's suggestion that pipelines be required to prove that facilities are used and useful before rate increases are authorized presents issues which are best addressed on a case-by-case basis since circumstances will vary on individual pipelines.

2. CD Reductions and Bypass

The American Public Gas Association (APGA), Associated Gas Distributors (AGD), Michigan, NI–Gas and United Cities argue that the Commission should permit contract demand reductions by LDCs to the extent that they sustain load loss attributable to pipeline bypass. APGA and AGD maintain that the granting of such rights would avoid inequitable cost shifts to the remaining consumers of such LDCs. AGD and United Cities state that when bypass is effectuated, the LDC's supply requirements are reduced by the level of its purchases that were made to serve the portion of its market now served directly by the pipeline. Since that amount is easily traceable, they argue, the concerns expressed by the *AGD I* court with appropriate cost allocation would be met. Further, they argue that fundamental principles of fairness require that the pipeline bear the risks associated with its voluntary exercise of a bypass procedure.

The Commission declines to generically require CD reductions in the event of bypass on a generic basis in this final rule. The reasons for a particular excess of contract demand may vary. The circumstances surrounding a particular bypass may also vary greatly from case to case. And the amount of contract demand associated with a particular bypass often may not be as readily traceable as some commenters suggest. Accordingly, the Commission continues to believe that a case-by-case approach is appropriate to address CD reductions associated with bypass. Such a case is the *NI-Gas* proceeding.[136]

3. CD Reductions and GICs

In a joint filing, ANR Pipeline Company and Colorado Interstate Gas Company (ANR–CIG) complain about the requirement that in order to obtain a GIC, a pipeline must allow its customers a continuing right to reduce their contract demand. Tennessee makes a similar argument. On the other hand, Northern Illinois Gas Company (NI-Gas) argues that the Commission should amend section 2.105(b) of the GIC policy statement to reflect the discussion in Order No. 500–H to provide customers

[135] Interstate Natural Gas Pipeline Rate Design, *et al.*, 47 FERC ¶ 61,295 at pp. 62,055-56 (1989); *order on reh'g*, 48 FERC ¶ 61,122 at pp. 61,477-48 (1989), *appeal docketed*, Public Service Commission of Wisconsin v. FERC, No. 89–1598 (D.C. Cir. Sept. 25, 1989).

[136] Northern Illinois Gas Company v. Natural Gas Pipeline Company of America, 48 FERC ¶ 61,337 (1989).

the option of reducing rather than converting unwanted sales contract demand.

Section 2.105 is only a general statement of policy as to a GIC. All specifics of that policy, such as the role of CD reductions in the context of GICs, will be addressed in individual cases. Nothing in Order No. 500–H should be interpreted to mean that CD reductions are required in every case. In fact, the Commission has approved GICs which did not contain general CD reduction provisions.[137] Accordingly, the Commission will not amend section 2.105 of the Commission's GIC policy statement at this time.

E. Contract Demand Conversions

In Order No. 500–H, the Commission clarified the operation of the section 284.10 contract demand conversion provisions with regard to pre-granted abandonment of transportation service at the termination of the transportation contract, and to abandonment of sales service when customers convert.

1. Pre-granted Abandonment of Firm Transportation Service

Section 284.221(d) of the regulations provides for the abandonment of transportation services upon the expiration of the contractual term of each individual transportation arrangement authorized under a blanket transportation certificate. In Order No. 500–H, the Commission affirmed the *Transco* case [138] that held that § 284.221(d) applies to firm transportation service converted from firm sales service. The Commission so clarified the operation of pre-granted abandonment in order to help ensure that capacity needed by other shippers, including industrial end-users, became available. The Commission determined that open gas transportation markets should not be hampered by unnecessary constraints and protections for only a certain customer class. In addition, the Commission was concerned that pipelines should make capacity available to the parties which value it most. The Commission also found that firm sales customers converting to firm transportation are adequately protected by their transportation contracts and by the Commission's consideration of customer needs in GIC and rate proceedings.

a. *Legal Arguments.* (i) *Consistency with NGA section 7(b)* Citing *AGD I* [139] and *Mobil Oil Exploration and Producing Southeast, Inc., et al.* v. *FERC,*[140] Pacific Gas and Electric Company (Pacific Gas) and Wilcox argue that NGA section 7(b) prohibits the Commission from generically determining that pre-granted abandonment of transportation is warranted. Citing *FPC* v. *Moss,*[141] Central Hudson, *et al.*, argue that section 7(b) prohibits abandonment absent specific findings by the Commission. Southern Union and Wilcox argue that pre-granted abandonment is inconsistent with *United Gas Pipe Line Co.* v. *McCombs* [142] because that case holds that pipelines may not have the unilateral power to terminate their service. Southern Union claims that before a specific service abandonment may be authorized, the Commission must make a specific factual determination concerning the likely consequences of having to secure a new supply. Southern Union and United Distribution Companies claim that under several producer abandonment cases, *Sunray Mid-Continent Oil Company* v. *FPC*[143] and *California* v. *Southland Royalty Company,*[144] the Commission is precluded from authorizing the proposed pre-granted abandonment.

The Commission rejects these arguments. The Commission had ample grounds to provide generic authority for pre-granted abandonment of Part 284 transportation service. The ultimate criterion in determining whether abandonment should be granted under section 7(b) is whether it is in the public interest.[145] The Commission's policy concerning pre-granted abandonment is in the public interest because it helps ensure that parties not currently benefitting from Part 284 transportation will have an opportunity to obtain service, and pre-granted abandonment is likely to increase the number of shippers which tends to enhance competition in the transportation and sale of gas. Further, the Commission's policy helps ensure that capacity will not be retained by existing customers if it is not needed by them, and the policy gives customers an incentive to accurately nominate the length of their contracts.

These benefits outweigh any potential detrimental impacts from the Commission's policy since those impacts may be alleviated by options available to affected customers. First customers may obtain firm transportation gas for the term of their transportation contract if they convert. Second, they may obtain interruptible gas from alternative suppliers through interruptible transportation contracts as long as the pipeline is providing Part 284 transportation service. Customers' ability to utilize alternative interruptible supplies is enhanced to the extent that their pipeline transporter provides firm standby sales service, as some pipelines have. [146] Finally, as noted in Order No. 500–H, [147] through rate settlements customers have been able to negotiate conversion transportation arrangements that extend beyond the term of the underlying sales contract.

The Commission is concerned that comparable transportation be available to customers so that they have meaningful conversion rights. Indeed, in the *Transco* GIC proceeding, the Commission has expressly recognized that "it may be appropriate to condition a gas inventory charge certificate to limit a pipeline's ability to abandon firm service if it adopts a gas inventory charge." [148] Accordingly, the Commission directed the parties to submit evidence concerning whether firm transportation is equivalent to transportation under firm sales contracts, and required Transco to show that any limitations on access to gas supply do not make transportation service resulting from CD conversions inferior to the transportation component of the pipeline's firm sales rates.[149] As more fully discussed below, various parties have presented the Commission with a number of theoretical arguments concerning the impact on customers' bargaining position and ability to meet public service obligations, and the alleged bias in favor of sales gas which results from pre-granted abandonment. However, no party has cited any specific instance where a customer has been unable to obtain a rollover

[137] El Paso Natural Gas Company, 49 FERC ¶ 61,262 (1989).

[138] Transcontinental Gas Pipe Line Corporation, 43 FERC ¶ 61,196, *reh'g denied,* 44 FERC ¶ 61,105 (1988).

[139] 824 F.2d 981 at 1015–1016, (D.C. Cir. 1987).

[140] 885 F.2d 209 at 223 (5th Cir. 1989), *petition for cert. filed,* _____U.S.L.W._____ (1989). The Commission will not address arguments relating to this case since it has petitioned the Supreme Court for certiorari.

[141] 424 U.S. 494 (1976).

[142] 442 U.S. 529 (1979).

[143] 364 U.S. 137 (1960).

[144] 436 U.S. 519 (1978).

[145] Transcontinental Gas Pipe Line Corporation v. FPC, 488 F.2d 1328 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974).

[146] Texas Eastern Transmission Corporation, 44 FERC ¶ 61,413 at p. 62,325 (1988), *reh'g denied,* 47 FERC ¶ 61,100 (1989).

[147] Order No. 500–H, 49 FERC ¶ 61,325, slip op. at 226–27.

[148] Transcontinental Gas Pipe Line Corp., 46 FERC ¶ 61,364 at 62,143–4 (1989).

[149] Transcontinental Gas Pipe Line Corporation, 47 FERC ¶ 61,244 at 61,848 (1989).

contract or otherwise establish a reasonable pre-granted abandonment procedure to make its conversion rights meaningful.[150] The Commission will consider any such allegations when they are presented to it in a general rate case, a GIC proceeding or a separate complaint proceeding.

In addition, the Commission has provided the hearing required by section 7(b) in the present proceeding. The Commission has considered the comments of all segments of the natural gas industry as set forth in their requests for rehearing of the Order No. 500 series of decisions.

Further, the Commission's decision is entirely consistent with *AGD I*. The essence of the court's opinion in *AGD I* was to reject arguments that the Commission had not complied with section 7(b). Pacific Gas claims that it is significant that the court in that case stated that the substantial concerns related to pre-granted abandonment are altogether different when the abandonment is at the purchaser's election.[151] Yet this reference also supports the Commission's pre-granted abandonment policy. As the court indicated,[152] pre-granted abandonment without the consent of the purchaser may be more difficult to justify in a period of acute shortage where the purchaser has very limited supply alternatives available. But a pre-granted abandonment procedure is clearly supportable where the purchaser, the LDC in this case, has the ability to negotiate for service alternatives. As indicated above, many customers have substantial service alternatives available which include supplies from other pipelines, interruptible transportation, and supplies transported by the abandoning pipeline under rollover contracts or other arrangements negotiated in rate settlements or required in GIC proceedings. If this turns out not to be the case based upon the facts of a particular case, the Commission will ask the parties to consider appropriate steps, as was done in *Transco*.[153]

FPC v. *Moss* also does not require a different result. As Central Hudson, *et al.*, concede, the Supreme Court in that case held that section 7(b) authorizes the Commission to pre-grant an abandonment of service at the time it approves the certificate for that service. Central Hudson, *et al.*, argue, however, that *FPC* v. *Moss* requires that the abandonment authorization must be based on proper findings supported by substantial evidence. The Commission has complied with this standard. As discussed above, the customer is protected under the Commission's pre-granted abandonment policy.

For these same reasons, the *McCombs*, *Sunray*, and *Southland Royalty* cases do not require modification of the Commission's pre-granted abandonment policy since the courts in those cases were also concerned with an abandonment procedure which was controlled by the supplier. Contrary to Southern Union's argument, the Commission need not make a specific factual determination concerning the likely consequences of an LDC having to secure a new supply since the LDC had the option of relying on pipeline supply in the first instance.

It may be argued that LDCs which have already converted do not have the option to rely on sales service. However, as discussed below, the Commission believes that Order No. 436 and the regulations promulgated by it were sufficiently clear so that a customer that may have already converted to transportation service had ample notice of the implications of its choice when it made its decision.

(ii) *Consistency with Order No. 436* AGD argues that until the Commission began implementing its pre-granted abandonment policy in individual cases, there was no indication that the Commission intended to apply section 284.221(d) of its regulations to situations in which the transportation service in question was acquired as a result of conversion from firm sales service. It states that in Order No. 436, the Commission contemplated some exceptions to the pre-granted abandonment of transportation service because the Commission stated that there was to be no change in the quality or priority of a customer's service due to its conversion from sales to transportation. It further argues that § 284.221(d) should be construed narrowly because it was developed to facilitate limited term abandonment since its predecessor regulation was an attempt to close a perceived difference in the transportation authority established by section 311 of the NGPA, and the transportation authority otherwise available to interstate pipelines.

The Commission believes it was clear in Order No. 436 that § 284.221(d) would apply to conversion transportation since there was no indication that the section would apply to some transportation but not other transportation. The Commission's statements concerning the quality of service do not require a different result. The Commission has maintained the same quality of service by requiring that conversion transportation service receive the same capacity scheduling and curtailment priority as firm sales service.[154] Nor is it controlling that one of the reasons for the adoption of § 284.221(d) was to facilitate limited term abandonment. Since the customer is protected under the Commission's pre-granted abandonment policy, that policy should apply to conversion transportation as well as to other limited term transportation.

(iii) *Consistency with § 284.10* Pacific Gas argues that since section 284.10 of the regulations allows customers to convert existing Natural Gas Act (NGA) section 7 sales certificates to corresponding rights to firm transportation, the transportation provided pursuant to section 284.10 arises out of the previous section 7 authority and not from the pipeline's blanket transportation authority. Pacific Gas concludes that pre-granted abandonment does not apply to conversion transportation. AGD argues that since 284.10 specifically addressed abandonment of sales service in the context of conversions, but did not address abandonment of conversion transportation service, section 284.221(d) should not apply to that service.

The Commission rejects these arguments. Regardless of the previous sales certificate, conversion transportation is provided under the pipeline's blanket certificate, or pursuant to section 311 of the NGPA if the pipeline has not accepted a blanket certificate. Since conversion transportation and other part 284 transportation are generally provided pursuant to the same transportation rate schedules, the same abandonment

[150] Wilcox states that El Paso Natural Gas Company is only offering new transportation agreements with a term equal to the remaining term of its firm sales service agreements. However, in the El Paso GIC order, the Commission noted that El Paso agreed that, unless El Paso and the customer have agreed to some other duration, a customer's firm transportation rights would continue in effect at least as long as El Paso's GIC mechanism was in place. El Paso Natural Gas Company, 49 FERC ¶ 61,262 at p. 61,934. Thus, Wilcox' allegation only supports the Commission's view that GIC proceedings and rate settlements provide an adequate means of providing customers with continuing transportation service.

[151] *AGD I*, 824 F.2d 981 at 1015.

[152] *Id.*

[153] Transcontinental Gas Pipe Line Corporation, 46 FERC ¶ 61,364 at 62,143–4, 47 FERC ¶ 61,244 at 61,848 (1989).

[154] Tennessee Gas Pipeline Company, 41 FERC ¶ 61,310 at p. 61,816 (1987).

procedures should apply to both.[155] A customer's conversion rights could not be exercised in the absence of part 284 transportation and therefore it is arbitrary to conclude that conversion transportation "arises out of" [156] the pipeline's previous section 7 sales authority. Further, the absence of abandonment provisions addressing conversion transportation in § 284.10 does not support AGD's argument. The Commission did not establish such provisions in § 284.10 because § 284.221(d) provided all the necessary pre-granted abandonment authority.

(iv) *Consistency with § 157.106* Wilcox argues that pre-granted abandonment is inconsistent with § 157.106 of the regulations. That section provides that if a customer has received notice from the holder of an optional certificate that it intends to abandon any part of the service, the customer can file a petition under § 385.207 protesting the abandonment and requesting issuance of an order directing continuation of the service in accordance with the expired contractual agreement. Wilcox further states that the Commission has determined that such an order will be issued if the customer is unable, after having made reasonable efforts, to arrange for alternative service and the customer will pay the rate on file for the new service. It maintains that this discrepancy is unjustified since the traditional NGA customer pays all of the pipeline's costs while the pipeline bears all of the risks under the optional certificate procedure.

The Commission rejects Wilcox' argument. The § 157.106 procedure is appropriate for optional certificates while pre-granted abandonment is appropriate for conversion transportation because customers of optional certificate holders, unlike converting customers, did not have the option of retaining sales service in the first instance. Under § 157.103(b) of the regulations, optional certificates provide only for authorization to construct or acquire and operate qualifying facilities and to provide new service. Section 157.101(a)(3) defines qualifying facility as a facility or a portion of a facility that will be used solely to provide new service. Therefore, optional certificates involve new service to customers which were not receiving an alternative existing service in the same way that customers converting to transportation service were receiving their existing sales service.

(v) *Relation to blanket certificate* Wilcox argues that the Commission should require that the contractual term of each individual transportation agreement authorized under a blanket certificate be coextensive in duration with the life of the blanket certificate. Wilcox maintains that pre-granted abandonment is inconsistent with the requirement that a pipeline file to abandon its blanket certificate.

Wilcox has not supported this proposal. The Commission believes that the proposal unnecessarily limits the freedom of the parties to contract. In addition, as explained, above, the Commission's pre-granted abandonment policy promotes competition and access to the pipeline whereas the abandonment of a blanket certificate is likely to have the opposite effect. Further, it is appropriate for the Commission to require pipelines to file to abandon their blanket certificates even if pre-granted abandonment exists for conversion transportation. The blanket certificate establishes the fundamentals of the Commission's open access transportation program. The Commission is unwilling to give the pipelines the unilateral right to terminate open access transportation.

(vi) *Consistency with GIC proceedings* Citing *Tennessee Gas Pipeline Company*,[157] an order involving a pipeline's GIC proceeding, Central Hudson argues that if pre-granted abandonment should be limited in a GIC proceeding to limit the exercise of a pipeline's monopoly power,[158] the Commission should preclude the pipelines from exercising their monopoly power by not providing for pre-granted abandonment of converted firm transportation. Hadson, the Illinois Commerce Commission, NI-Gas and Southwest Gas make similar arguments. Con Ed, *et al.*, argue that the *Tennessee* order is inconsistent with the notion that customers may freely negotiate their transportation contracts with pipelines. The California Commission also argues that it is inconsistent for the Commission to simultaneously promulgate a rule which generically authorizes pre-granted abandonment and state that parties can attempt to avoid the effects of that rule in individual rate cases and GIC proceedings.

It is entirely appropriate for the Commission to require that pipelines provide transportation service that is fully comparable to the transportation component of their sales service when they are permitted to assess a GIC and recover certain gas costs through a fixed charge thus improving the competitiveness of their sales gas. Therefore, the Commission has approved settlements which provide that pre-granted abandonment of transportation service under § 284.221(d) of the regulations would not be applicable to any long-term converted transportation.[159] While the Commission's general policy providing for pre-granted abandonment is appropriate in most cases, the Commission will examine in individual GIC proceedings allegations concerning whether the establishment of a GIC together with its right to abandon conversion transportation service will enable the pipeline to assert monopoly power. In the *Transco* GIC proceeding, as discussed above, the Commission directed the parties to submit evidence concerning whether firm transportation is equivalent to transportation under firm sales contracts.

b. *Policy Arguments.* (i) *Bias in favor of sales gas* APGA, *et al.*, AGD, Hadson, the Illinois Commerce Commission, Michigan, Process Gas, *et al.*, Southwest Gas, United Distribution Companies and Wilcox argue that the Commission's pre-granted abandonment policy fails to give LDCs the same protection concerning transportation service that they receive with pipeline sales service, and that, as a result, CD conversions are discouraged and a fully functioning firm transportation gas market cannot develop. They maintain that under the Commission's policy, transportation does not have the same continuity of service that sales has.

The Commission rejects this argument. As stated above, the Commission believes that customers retain substantial ability to negotiate for alternative services. In addition, the parties overstate the benefits and advantages of sales service. Sales customers do not have unlimited freedom to specify new sales contracts when their old contracts expire. If the pipeline is not granted abandonment, the sales customers may continue their existing service at the previous level,

[155] There is, however, no abandonment procedure for NGPA section 311 transportation. No certificate is issued for this transportation and there is no service obligation to provide it. Thus there is nothing to abandon. The relationship between the parties is governed by contract.

[156] Pacific Gas' Request for Rehearing, at p. 5, fn. 2

[157] 47 FERC ¶ 61,245 at p. 61,862 (1988).

[158] In *Tennessee*, the Commission held that it may be appropriate to condition a GIC certificate to limit a pipeline's ability to abandon firm transportation service as a protection against the pipeline's exercise of market power. The Commission allowed the parties to explore this issue in the hearing proceeding established in that order.

[159] Transcontinental Gas Pipe Line Corporation, 48 FERC ¶ 61,399 at p. 62,622 (1989).

they may terminate it entirely, or they may negotiate with the pipeline for some level of service below their previous contract demand. But in the latter case, as in the case of a transportation customer subject to pre-granted abandonment, the customer and the pipeline must negotiate for an acceptable resolution of their differences.

(ii) *Rate cases, settlements, and customers' bargaining power* Citing *Transwestern Pipeline Company*,[160] the California Commission argues that it is too late in some cases to seek relief because the Commission could not now retroactively impose a condition concerning pre-granted abandonment on the pipeline applicant. The California Commission and APGA, *et al.*, also claim that a pipeline could exploit its customers during rate case settlements as a *quid pro quo* for new service agreements. AGD argues that the possibility of settlements does not support the Commission's determination because reliance on settlements begs the question of whether pre-granted abandonment is appropriate and the Commission's policy puts the pipeline's customers in the anomalous position of having to negotiate for that which is lawfully theirs in the first place. The California Commission further claims that rather than allow pre-granted abandonment, the Commission should allow LDCs to give up their firm capacity to end users through capacity assignments during the year when it is not critical for LDCs to maintain such firm capacity. Process Gas, *et al.*, claim that while some pipelines have been willing to make concessions concerning pre-granted abandonment, others have been unwilling to do so or have only done so for some classes of firm shippers.

Pacific Gas claims that the Commission erroneously relies on customers' ability to deal with unwanted pre-granted abandonment through contractual negotiation. The Public Utilities Commission of the State of California (California Commission) also argues that the Commission erroneously assumes that customers can freely negotiate with pipelines for as much contract stability as they may desire. APGA, *et al.*, Mich Con, Process Gas, *et al.*, Southwest Gas, United Distribution Companies, and Wilcox make similar arguments. Citing *Transcontinental Gas Pipe Line Corporation v. FPC*,[161] Con Ed, *et al.*, argue that in enacting section 7(b), Congress intended that the Commission look at more than the term of a contract before authorizing cessation of service. In addition, Con Ed, *et al.*, argue that the notion that customers can freely negotiate is inconsistent with the Commission's decision to require a contract conversion option because the option was essential to rectify the pipeline's exercise of their monopoly power over transportation.

The Commission rejects the argument made by the California Commission that rate cases provide inadequate relief for customers. Any time before pre-granted abandonment takes effect the pipeline and its customers may agree to establish procedures to provide for the continuation of service, which occurred in the *Transco* and *Natural* settlements referenced above. The arguments raised on rehearing concerning customers' ability to negotiate are erroneous because, as explained above, customers have substantial ability to utilize alternative supplies and they have in fact been able to negotiate satisfactory rate settlements which have provided them additional security for their transportation gas. The Commission approved these settlements because, taken as a whole, they were just and reasonable and were fair to all parties including conversion transportation customers.

The Commission encourages the parties to establish, where appropriate, a program to allow LDCs to assign their capacity to end users and others, similar to that proposed by the California Commission. The Commission has previously indicated that it is receptive to capacity assignment programs,[162] and has approved such programs,[163] although the Commission has not imposed them on unwilling pipelines. However, the California Commission has not indicated why capacity assignments should be required as general matter, and the Commission therefore will not here require that pipelines offer capacity assignments.

(iii) *Public service obligation* Pacific Gas and United Distribution Companies argue that, because of their service responsibility, they must be assured that they can obtain reliable, competitively-priced transportation gas via interstate pipelines. In a similar vein, AGD argues that the historical absence of any significant Commission use of pre-granted abandonment has led to the creation of a gas utility system and to a series of commitments by parties, particularly LDCs and their customers, who rely on pipeline service without pre-granted abandonment. Con Ed, *et al.*, argue that elimination of pre-granted abandonment would not usurp capacity needed by other purchasers. They contend that assuring the LDC of abandonment protection so that the LDC may meet its service obligations is more important than assuring that other customers have access to the LDC's capacity at the end of the LDC's contract term. Mich Con makes a similar argument and also maintains that LDCs will not retain and pay for firm capacity that they do not need. Process Gas, *et al.*, add that the need to rely on continuity of service is also critical for industrials, producers, and marketers who need continuity of service in order to make plant investments and firm supply and market commitments.

The arguments concerning LDCs' public service obligation are not persuasive since, as discussed above, most customers retain the ability to negotiate for alternative service. LDCs as well as pipelines are constantly called upon to make judgments concerning the reliability, cost and value of various services. This is nothing new. However, in order for LDCs and pipelines to determine what best allows them to meet their public interest obligations, it is important that the applicable rules be clear and that the implications of particular choices be predictable.

(iv) *Economic justification* Con Ed, *et al.*, also argue that pre-granted abandonment cannot be justified as a means to assure that pipeline capacity is made available to those who value that capacity the most. Citing *Gainesville Utility Department* v. *Florida Power Corporation*,[164] they maintain that focus on the willingness of the purchaser to pay for service is the concern of the monopolist, not a government agency charged with assuring the public reliable and efficient service at a reasonable price. Southern Union maintains that the Commission's proposed economic standard should not result in capacity being taken away from a customer willing to pay the maximum authorized rates.

In addition, Process Gas, *et al.*, argue that the Commission does not justify pre-granted abandonment when it states that if pre-granted abandonment is not allowed, capacity needed by other purchasers may never become available. Process Gas, *et al.*, claim that capacity

[160] 43 FERC ¶ 61,240 (1988), *reh'g.* 44 FERC ¶ 61,164 (1988) *appeal pending.*

[161] 488 F.2d 1325, (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

[162] Transcontinental Gas Pipe Line Corporation, 48 FERC ¶ 61,399 at p. 62,638 (1989).

[163] Texas Eastern Transmission Corporation, 48 FERC ¶ 61,248 (1989), *clarified*, 48 FERC ¶ 61,378 (1989).

[164] 402 U.S. 515 (1971).

is even less likely to become available if, threatened by pre-granted abandonment, LDCs do not convert to firm transportation or are forced to sign very long term contracts upon conversion in order to protect themselves. Southern Union argues that if the Commission is concerned about making capacity available to other users behind a customer's city gate, the pipeline needs to terminate only that portion of service to the customer related to particular, determinable and limited requirements of purchasers behind the city gate.

The Commission continues to believe that it is important to promote economic efficiency to the extent legally permissible. Economic efficiency is enhanced when capacity is made available to those who value it most. There is nothing wrong with considering how much different customers value capacity as long as the pipeline is not allowed to exercise monopoly power or charge unjust and unreasonable rates. While a monopolist is concerned with customer's willingness to pay, so may a regulatory agency as long as the applicable legal requirements are met. The Commission does not read the *Gainesville* case to mean that the Commission must in all circumstances ignore how much customers value capacity.

With regard to Southern Union's argument concerning maximum rates, a customer willing to pay the maximum just and reasonable rate by definition would retain the capacity if only an economic standard were applicable. However, Southern Union may be concerned that the maximum rate just and reasonable rate may rise in the future and the customer would be willing to pay only the current maximum rate. The Commission cannot, however, guarantee that the customer would never need to pay more than the current maximum rate because even strictly cost-based rates may rise. In any event, Southern Union raises a rate matter which is not central to the merits of the Commission's pre-granted abandonment policy.

With regard to Process Gas, *et al.*'s argument, the Commission anticipates that if LDCs have capacity they do not need, they will seek contract demand reductions through the voluntary procedures described elsewhere in this order and in Order No. 500–H. Even assuming there would be somewhat less capacity available if pre-granted abandonment applies, Process Gas, *et al.*, have provided no reason to believe that this problem would be significant. In addition, the Commission declines to adopt Southern Union's proposal that the pipeline be allowed to terminate only that portion of service related to specific customers behind the city gate. It is likely to be difficult in many cases to determine exactly how much service should be abandoned and who are affected customers. Southern Union's proposal would involve the Commission and the parties in many intricate factual determinations.

c. *Methods of Limiting Pre-granted Abandonments.* (i) *Evergreen contracts* NI-Gas argues that the Commission should establish reasonably conditioned unilateral evergreen rights for all firm transportation customers. Citing *Natural Gas Pipeline Company of America*, [165] NI-Gas states that to protect the legitimate interests of pipelines, the evergreen right should require affirmative notification to the pipeline by the shipper within a specified time, require the shipper to pay the pipeline's maximum lawful rates unless otherwise agreed in writing, and the right should apply only to contracts with a minimun initial term and a minimum rollover period. NI-Gas maintains that this would limit a pipeline's ability to exercise monopoly power, preserve a distributor's ability to service its high priority markets, and provide a pipeline with adequate flexibility to attempt to market unused capacity to new customers.

NI-Gas' proposal has merit if it is the result of free negotiations between the parties. The fact that such a proposal was in fact negotiated by the parties and approved by the Commission in the *Natural* case indicates that voluntary negotiation through rate settlements is a valuable option available to a pipeline's customers. However, while NI-Gas' proposal may be appropriate on Natural's system, circumstances may vary on other systems which would make it inappropriate to require the proposal there. Accordingly, the Commission prefers to address such proposals on a case-by-case basis.

(ii) *Maximum Rate* Process Gas, *et al.*, and Southern Union argue that shippers should not be subject to pre-granted abandonment if they desire to continue service and are willing to pay the maximum firm rate. Process Gas, *et al.*, maintain that this will protect firm customers' need for continuity of service while preserving the advantages of ready release of capacity no longer needed by a customer. They argue that the Commission's concerns about undue discrimination can be resolved by protecting all firm shippers from unilateral pre-granted abandonment. Process Gas, *et al.*, also state that pre-granted abandonment may be needed for temporarily released capacity.

Process Gas, *et al.*, argue for an alternative which is similar to that approved in the *Transco* settlement proceeding referenced in Order No. 500–H. As with NI-Gas' proposal, Process Gas, *et al.*'s, proposal may have merit in individual cases but whether that proposal should be approved in any such cases is a question best addressed when those cases are considered by the Commission.

(iii) *Customer Alternatives* Southern Union argues that pre-granted abandonment should not apply to customers who have no alternative pipeline transporters since that court in *AGD* assumed that the purchaser has a range of pipeline transportation options from which to choose.

Southern Union's proposal is not helpful because there are many cases in which it may be argued whether a particular customer has an alternative pipeline transporter. In particular, a question exists whether the alternative transporter must be within 5 miles, 25 miles, 100 miles, or some other distance. Questions also would exist concerning whether the alternative transporter has capacity available for the new customer.

d. *Pre-granted Abandonment of Transportation Service and the Interim Gas Inventory Charge Policy Statement.* The American Gas Association (AGA) proposes a detailed provision which would establish standards concerning pre-granted abandonment of firm transportation service for pipelines which have an interim gas inventory charge in effect. In the interim gas inventory charge policy statement proceeding in Docket No. PL89–1–000, AGA urged the Commission to adopt this provision.

The proper forum in which to explore AGA's proposal concerning interim GICs is in individual interim GIC cases. Accordingly, the Commission will not in this order take any action concerning AGA's proposal.

2. Pre-granted Abandonment of Sales Service

In Order No. 500–H, the Commission retained the CD conversion option, but modified § 284.10(d) of the regulations so that the Commission's grant of sales service abandonment authority is automatic upon, and to the extent of, the exercise of conversion rights by pipeline customers.

Michigan argues that allowing pipelines to abandon sales service when customers convert could have a negative

[165] 48 FERC ¶ 61,306 (1989).

impact on gas consumers by making long term gas supply less secure. It maintains that since the Commission's primary responsibility is to protect natural gas consumers, the Commission should reconsider the sales abandonment provisions, at least in the absence of some new mechanism under which pipelines warrant the availability of gas supplies for which customers pay a GIC.

Wilcox argues that the Commission erred in requiring mandatory automatic abandonment of certificated sales service under § 284.10(d). It maintains that there may be cases in which the pipeline exacts other concessions from the customers in exchange for preserving their sales rights.

CNG requests clarification that when a customer exercises contract provisions that allow it to discontinue standby service as to certain converted quantities, and simply receive firm transportation, that customer's action would result in automatic abandonment of CNG's sales obligation. CNG maintains that a customer's election to discontinue standby service is very similar to an election by the customer to convert from sales to firm transportation, and that to have a different rule for standby service would arbitrarily place form over substance.

Tennessee requests the Commission to clarify that pre-granted abandonment of sales service applies to all sales service associated with conversions that pipeline customers have claimed since Order No. 436. It maintains that this clarification would relieve Tennessee and other pipelines of the needless filing burdens associated with the Commission's previous requirement that separate abandonment applications be filed for each conversion. In addition, Tennessee argues, the Commission would clear its docket of abandonment applications filed as a result of conversions that are still pending.

On rehearing, the Commission rejects Michigan's general argument against abandonment of sales service in the event of CD conversions. It is true that an LDC's supply situation is somewhat less secure if a pipeline is permitted to abandon sales service upon conversion than if it could not. But when it converts, an LDC is choosing to rely on transportation gas instead of sales gas. After it converts the LDC need not pay sales demand charges. Mutuality of obligation and rational supply planning require that the pipeline upon conversion be relieved of its obligation to provide sales service as well. Otherwise, the pipeline could be required to maintain supplies to be ready to serve a customer which no longer uses its sales service. This is true regardless of whether the pipeline is allowed to assess a GIC, and regardless of the terms of the GIC.

Nor has Wilcox provided a reason for changing the Commission's determination in Order No. 500–H. Wilcox argues that, in the context of CD conversions, pipelines may attempt to exact concessions from customers in exchange for preserving their sales rights. In other words, pipelines may attempt to extract benefits for providing standby sales service in the event a customer chooses to exercise its § 284.10 rights and convert to firm transportation. The Commission has previously held that a pipeline is not required to offer standby service. To the extent that a pipeline offers standby sales service it must do so under terms and conditions that the Commission finds just and reasonable. If the customer does not like the terms of the standby service, or the options available to it upon exercise of its § 284.10 CD conversion rights, the customer can always opt for the status quo and retain conventional firm sales service under terms and conditions determined by the Commission to be just and reasonable.

The Commission rejects CNG's proposal that automatic pregranted abandonment of pipeline sales service upon conversion also apply to standby sales service offered to customers upon conversion. Automatic abandonment of the standby sales service contracts is not available under section 284.10 since those contracts are not eligible firm sales service agreements subject to conversion. Section 284.10(b) of the regulations defines eligible agreements to be those firm sales agreements between a part 284 interstate pipeline and a customer that were entered into before the pipeline accepted its blanket transportation or began providing part 284 transportation pursuant to NGPA section 311 or certain transportation on the outer continental shelf. The standby service contracts in question do not qualify since they were executed after CNG began providing part 284 transportation service. Furthermore, the Commission believes that abandonment of standby sales service is best addressed on a case-by-case basis.

The Commission denies Tennessee's proposal that automatic pre-granted abandonment of sales service apply to sales service associated with conversions which occurred prior to the effective date of the regulations adopted in Order No. 500–H. The Commission's intent in Order No. 500–H was that the pre-granted abandonment adopted there apply prospectively only. The Commission will address pipeline applications for abandonment of sales obligations in conjunction with conversions that have already been claimed in a separate order or orders.

F. Other Matters

In Order No. 500–H, the Commission "continue[d], with certain modifications, the open-access transportation program originally adopted in Order No. 436 and kept in place on an interm basis by Order No. 500." [166] The City of Willcox Arizona contents that the Commission cannot continue the open-access regulations readopted in Order No. 500. Willcox asserts that the *AGA* decision vacated Order No. 500, thus rendering all the regulations adopted in that order, including those implementing the Commission's open-access transportation program, void. Accordingly, Willcox asserts, there was nothing for the Commission to continue. The short answer to Willcox's contention is that the *AGA* court did not vacate the regulations adopted in Order No. 500. Rather, the court remanded the record and "require[d] the Commission to provide a reasoned basis for the problematic aspects of its decisions * * * and to do so in a final rule, within 60 days of this decision. The final rule must also include a reasoned justification for any changes that the Commission may make in the status quo (*i.e.*, Order No. 500 and its sequelae) as of the time it issues." The aspects of the Commission decisions which the court found problematic related only to the Commission's treatment of take-or-pay and not to other aspects of the Commission's open-access transportation. The Commission has tried to provide the explanations required by the court in Order No. 500–H. Since the court simply remanded the case for further explanation and did not vacate Order No. 500 or find problems with the open-access transportation regulations, the Commission can continue those regulations in Order No. 500–H.

The Producer Associations assert that the final rule does not meet the requirements of the Paperwork Reduction Act and the Regulatory Flexibility Act because the final rule, by eliminating the casinghead gas exception to the crediting mechanism, requires new transportation arrangements for released gas and because it extends the duration of the crediting mechanism. The Commission does not agree. Order No. 500–H found that the requirements of both acts were satisfied and that any lesser level of

[166] *Slip op.* at 2.

compliance with the requirements of the final rule would nullify its effect.[167]

IV. Conclusion

The Commission takes this final opportunity to put into context where the gas industry has come since the early 1980's. For after numerous pages of commission orders and the industry's briefs since this odyssey began, several facts clearly emerge. First and foremost, the American gas consumer has benefitted enormously since the advent of the open-access program. Average gas prices—even with take-or-pay costs added—have decreased significantly as open-access enabled a competitive gas market to flourish. To be sure, the transition to this competitive costs have been shared by pipelines, producers, consumers, and some LDCs. But in the long-run, the gas industry will, as a result of its new found competitive posture, play an increasingly important role in our nation's energy future. Not a single entity to this proceeding can reasonably dispute this development.

Second, after five years of litigation, each and every segment of the gas industry continues to argue for the "perfect" take-or-pay solution that fits its own economic interest. This is to be expected. And while the Commission's actions have not always been "perfect", the Commission cannot simply side with the producers' interests, the pipelines' interests, or the LDCs' interests. Simply put, the Commission must protect the public interest. Competing claims by each segment of the industry have been considered, evaluated and balanced based upon a record spanning some five years. In the Commission's judgement, based upon its statutory responsibilities and expertise, the final rule accomplishes above all else the Commission's fundamental objective: the provision of sufficient supplies of natural gas at reasonable prices.

V Effective date

The amendment to the Commission's regulations adopted in this order on rehearing will become effective on March 28, 1990.

List of Subjects in 18 CFR Part 284

Continental Shelf, Natural Gas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission denies rehearing in part, and amends part 284, chapter I, title 18 of the *Code of Federal Regulations*, as set forth below.

[167] 49 FERC ¶ 61,325, *slip op.* at 229–231.

By the Commission. Commissioner Moler *dissented in part* with a separate statement attached.

Lois Cashell,

Secretary.

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

3. The authority citation for part 284 is revised to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717–717w, as amended; Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3422; Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331–1356 as amended; Department of Energy Organization Act, 42 U.S.C. 7101–7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

§ 284.8 [Amended]

1. In § 284.8, paragraph (f)(4)(ii)(C) is amended by removing the number "30", and inserting in lieu thereof the number "60".

§ 284.9 [Amended]

2. In § 284.9, paragraph (f)(4)(ii)(C) is amended by removing the number "30", and by inserting in lieu thereof the number "60".

Appendix A

AGD contends that the Commission's estimate that 45.5 percent of year-end take-or-pay liability relates to jurisdictional gas is in error because it "excluded from the 'jurisdictional" amounts take-or-pay dollars attributable to NGPA sections 109 and 107(c)(5), and some section 108, none of which categories are removed from NGA jurisdiction by NGPA section 601(a)(1)." [1]

The Commission rejects AGD's contentions in regard to section 108 gas. While some section 108 gas is subject to the Commission's jurisdiction, other section 108 gas is removed from the Commission's jurisdiction. For example, non-jurisdictional section 103 new gas could qualify for section 108 prices when production declined sufficiently. Accordingly, the Commission properly segregated the data related to NGPA section 108 between jurisdictional and non-jurisdictional. This segregation was a requirement of the Commission's August 1987 data request sent to the interstate gas pipelines. Thus, AGD's contention in this regard is without merit.

AGD's contention regarding section 109 has been closely examined. It is true that OCS gas in the federal domain qualifies for section 109 ceiling prices and that this gas is subject to the Commission's NGA jurisdiction. Accordingly, the Commission has aggregated the individual contract data reported by the pipelines on the basis of geographical area (*i.e.*, offshore versus onshore) to estimate the amount of year-end 1986 take-or-pay exposure related to section 109 gas that is attributable to offshore areas. This analysis indicates that approximately 1.5 percent ($137 million) of total year-end 1986 take-or-pay liability may be related to jurisdictional section 109 gas and 3.0 percent ($282 million) to non-jurisdictional section 109 gas. Note, however, that all offshore amounts, and not just the jurisdictional Federal OCS portion, are included in the estimate of jurisdictional section 109 take-or-pay liability. However, even with this approach, only another 1.5 percent of take-or-pay dollars at the end of 1986 could have been under the Commission's jurisdiction.

In regard to section 107(c)(5) gas, AGD fails to recognize that most section 107(c)(5) gas is new tight formation gas. By definition, new tight formation gas has to qualify as section 102 or section 103 gas and is therefore removed from NGA jurisdiction.[2] The Commission's jurisdiction over OCS gas is not relevant here because there are no formations designated as section 107(c)(5) "tight formations" in that classification. Of course, the Commission does have authority to terminate the section 107(c)(5) incentive ceiling price, and in an order issued on February 12, 1989, the Commission exercised that authority effective May 12, 1989.

Appendix B

Allocation of Take-or-Pay Under Alternate Mechanisms for Selected Pipelines [1]

ANR Pipeline Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation
ANR absorption	25.0000	25.0000	0.0000
Small sales customers	0.5189	0.2739	0.3477
Large sales customers	32.9467	25.8217	16.5833
Transportation customers	41.5345	48.9020	83.0690
Total	100.00	100.00	100.00

Colorado Interstate Gas Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation
CIG absorption	50.0000	50.0000	0.0000
Small sales customers	1.1836	0.0010	0.7820
Large sales customers	21.1727	44.8852	23.7607
Pipeline customers	27.6438	4.7557	0.7447
Transportation customers	0.0000	0.3550	74.7126
Total	100.00	100.00	100.00

[1] Request for Rehearing at 17

[2] FERC v. Martin Exploration Management Co., 486 U.S. 204 (1988).

[1] Notes and sources are included at the end of Appendix B.

El Paso Natural Gas Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation
El Paso absorption	25.0000	25.0000	0.0000
Small sales customers	0.5440	4.7844	0.5387
Large sales customers	31.7047	27.4619	13.9587
Transportation customers	42.7514	42.7514	85.5027
Total	100.00	100.00	100.00

Natural Gas Pipeline Company of America

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation
Natural absorption	50.0000	50.0000	0.0000
Small sales customers	0.1800	0.2450	0.1736
Large sales customers	49.8170	28.7650	27.1617
Transportation customers	0.0000	20.9950	72.6648
Total	100.00	100.00	100.00

Northwest Pipeline Corporation

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation
Northwest absorption	25.0000	25.0000	0.0000
Small sales customers	0.3192	0.6345	0.2773
Large sales customers	20.5897	30.3029	17.5284
Pipeline customers	12.9991	2.9706	0.0101
Transportation customers	41.0921	41.0921	82.1842
Total	100.00	100.00	100.00

Panhandle Eastern Pipe Line Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation
Panhandle absorption	50.0000	50.0000	0.0000
Small sales customers	0.2367	0.6800	1.0222
Large sales customers	34.2839	26.5900	7.2962
Pipeline customers	15.4795	1.1850	0.3152
Transportation customers	0.0000	21.5400	91.3664
Total	100.00	100.00	100.00

Sea Robin Pipeline Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation (percent)
Sea Robin absorption	50.0000	50.0000	0.0000
Affiliated pipelines	50.0000	50.0000	1.7306
Transportation customers	0.0000	0.0000	98.2694
Total	100.00	100.00	100.00

Tennessee Gas Pipeline Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation (percent)
Tennessee absorption	50.0000	50.0000	0.0000
Small sales customers	0.5781	3.5990	1.6458
Large sales customers	3.3435	11.5899	8.8040
Pipeline customers	36.8196	22.2006	6.8114
Affiliated pipelines	9.2590	12.6105	8.5571
Transportation customers	0.0000	0.0000	74.1817
Total	100.00	100.00	100.00

Texas Gas Transmission Corporation

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation (percent)
Texas Gas absorption	25.0000	25.0000	0.0000
Small sales customers	1.2928	2.3681	1.9361
Large sales customers	17.2077	21.6222	12.5643
Pipeline customers	19.0169	11.8949	10.4497
Transportation customers	37.5250	39.1150	75.0499
Total	100.04	100.00	100.00

Transwestern Pipeline Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation (percent)
Transwestern absorption	25.0000	25.0000	0.0000
Small sales customers	0.0786	0.0961	0.1022
Socal gas	34.1207	37.1498	24.3896
Williams Natural	3.6418	0.0000	0.0000
Transportation customers	37.1605	37.7541	75.5082
Total	100.00	100.00	100.00

Trunkline Gas Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation (percent)
Trunkline absorption	50.0000	50.0000	0.0000
Small sales customers	0.4370	1.2939	1.3562
Large sales customers	11.9196	16.6115	29.6657
Pipeline customers	2.2986	0.0000	0.0000
Affiliated pipelines	35.3416	8.3573	0.4378
Transportation customers	0.0000	23.7323	68.5404
Total	100.00	99.99	100.00

United Gas Pipe Line Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation (percent)
United absorption	50.0000	50.0000	0.000
Small sales customers	0.7681	6.6700	0.9278
Large sales customers	7.7231	40.8100	5.5829
Pipeline customers	41.5050	2.5200	0.0000
Transportation customers	0.0000	0.0000	93.4892
Total	100.00	100.00	100.00

Williams Natural Gas Company

	Deficiency allocation (percent)	CD allocation (percent)	Volumetric allocation (percent)
Williams absorption	25.0000	25.0000	0.0000
Sales customers	48.8016	45.6009	47.9767
Pipeline customers	0.1867	0.4050	0.0000
Transportation customers	26.0117	28.9942	52.0233
Total	100.00	100.00	100.00

Notes and Sources

1. These schedules are intended to demonstrate impacts that may result if non-deficiency based allocation methodologies are used. The comparison methodologies chosen—contract demand (CD) and volumetric—are two methods suggested by petitioners on rehearing.

The CD-based allocation method essentially maintains intact the Commission's take-or-pay recovery method, but substitutes a direct bill based on CD factors in place of a direct bill based on deficiency allocation factors. The volumetric allocation method assumes that the Commission permits 100 percent of the buyout and buydown costs to be flowed through in a volumetric surcharge across total pipeline throughput.

2. The selected pipelines are those with significant buyout and buydown settlement costs that may be affected by *AGD II*.

3. Although pipelines' absorption under the volumetric surcharge is shown as zero, pipelines may in fact absorb some of these costs to the extent that they discount their transportation rates to counteract the increase in those rates caused by the surcharge. Additionally, many pipelines have marketing affiliates which may be assessed volumetric surcharges.

4. The impact on non-jurisdictional sales customers was excluded from these schedules.

5. The sources of the deficiency allocation percentages were pipelines' Order No. 500 buyout and buydown recovery filings.

6. The sources of the CD levels were the most recent available information from rate filings or settlements. Transportation CDs were aggregated with sales CDs for computing the total CD for customer classes.

7. Volumetric information was obtained from pipelines' 1988 Form 2s.

8. These schedules are for illustrative purposes only. While they are believed to be accurate, they should not be relied upon for anything other than their intended purpose: to show the potential impacts of changing from one allocation method to another. They are based on existing historical data, and may not fully reflect the pipelines' current or future sales or transportation profiles.

MOLER, Commissioner, *dissenting in part:*

I disagree with the Commission's decision not to grant rehearing on its clarification in Order No. 500–H that firm sales customers who convert to firm transportation are subject to pre-granted abandonment under § 284.221(d) of the Commission's regulations.

The Commission states that it "is concerned that comparable transportation be available to customers so that they have meaningful conversion rights" [1] and that providing the same "quality of service do(es) not require a different result".[2] Yet it does not provide comparable service because those who convert from firm sales to firm transportation are not given comparable protection at the termination of the contract term. The Commission's argument is, in essence, that if pre-granted abandonment turns out to be a problem, we will fix it when the problem arises. Simply put, that's not good enough.

I agree with those who contend that the Commission's policy is inconsistent with its desire to provide comparability of service for both sales and transportation customers. Unless and until the Commission takes action to treat both types of firm service the same, that goal will be an elusive one. Therefore I dissent on this aspect of the order denying rehearing.

Elizabeth Anne Moler,

Commissioner.

[FR Doc. 90–3770 Filed 2–23–90; 8:45 am]

BILLING CODE 6717–01–M

[1] Slip op. at 108.

[2] Slip op. at 113.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 430 and 442

[Docket No. 90N–0013]

Antibiotic Drugs; Sterile Cefmetazole Sodium

AGENCY: Food and Drug Administration HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the antibiotic drug regulations to provide for the inclusion of accepted standards for a new antibiotic drug, sterile cefmetazole sodium. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective March 28, 1990; written comments, notice of participation, and request for hearing by March 28, 1990; data, information, and analyses to justify a hearing by April 27, 1990.

ADDRESSES: Written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Peter A. Dionne, Center for Drug Evaluation and Research (HFD–520), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4290.

SUPPLEMENTARY INFORMATION: FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to a request for approval of a new antibiotic drug, sterile cefmetazole sodium. The agency has concluded that the data supplied by the manufacturer concerning this antibiotic drug are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in 21 CFR 430.4 by adding new paragraph (a)(62), in 21 CFR 430.5 by adding new paragraphs (a)(97) and (b)(99), in 21 CFR 430.6 by adding new paragraph (b)(99), and by adding new 21 CFR 442.70a and 442.270a to provide for the inclusion of accepted standards for this product.

Environmental Impact

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Submitting Comments and Filing Objections

This final rule announces standards that FDA has accepted in a request for approval of an antibiotic drug. Because this final rule is not controversial and because when effective it provides notice of accepted standards, FDA finds that notice and comment procedure is unnecessary and not in the public interest. This final rule, therefore, becomes effective March 28, 1990. However, interested persons may, on or before March 28, 1990 submit comments to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this final rule may file objections to it and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file: (1) On or before March 28, 1990, a written notice of participation and request for hearing, and (2) on or before April 27, 1990, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 314.300. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the heading of this

document and filed with the Dockets Management Branch.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 314.300.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects

21 CFR Part 430

Administrative practice and procedure, Antibiotics.

21 CFR Part 442

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 430 and 442 are amended as follows:

PART 430—ANTIBIOTIC DRUGS; GENERAL

1. The authority citation for 21 CFR Part 430 continues to read as follows:

Authority: Secs. 201, 501, 502, 503, 505, 507, 701 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321, 351, 351, 353, 355, 357, 371); secs. 215, 301, 351 of the Public Health Service Act (42 U.S.C. 216, 241, 261).

2. Section 430.4 is amended by adding new paragraph (a)(62) to read as follows:

§ 430.4 Definitions of antibiotic substances.

(a) * * *

(62) *Cefmetazole.* Cefmetazole is an antibiotic substance having the chemical structure described by the following name: (6*R*-cis)-7-[[[cyanomethyl)thio]acetyl]amino]-7-methoxy-3-[[(1-methyl-1*H*-tetrazol-5-yl)thio]methyl]-8-oxo-5-thia-1-azabicyclo[4.2.0]oct-2-ene-2-carboxylic acid.

3. Section 430.5 is amended by adding new paragraphs (a)(97) and (b)(99) to read as follows:

§ 430.5 Definitions of master and working standards.

(a) * * *

(97) *Cefmetazole.* The term "cefmetazole master standard" means a specific lot of cefmetazole that is designated by the Commissioner as the standard of comparison in determining the potency of the cefmetazole working standard.

(b) * * *

(99) *Cefmetazole.* The term "cefmetazole working standard" means a specific lot of a homogeneous preparation of cefmetazole.

4. Section 430.6 is amended by adding new paragraph (b)(99) to read as follows:

§ 430.6 Definitions of the terms "unit" and "microgram" as applied to antibiotic substances.

* * * * *

(b) * * *

(99) *Cefmetazole.* The term "microgram" applied to cefmetazole means the cefmetazole (potency) contained in 1.002 micrograms of the cefmetazole master standard.

PART 442—CEPHA ANTIBIOTIC DRUGS

5. The authority citation for 21 CFR part 442 continues to read as follows:

Authority: Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

New § 442.70a is added to subpart A to read as follows:

§ 442.70a Sterile cefmetazole sodium.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Sterile cefmetazole sodium is the sodium salt of (6*R*-cis)-7-[[[cyanomethyl)thio]acetyl]amino]-7-methoxy-3-[[(1-methyl-1*H*-tetrazol-5-yl)thio]methyl]-8-oxo-5-thia-1-azabicyclo[4.2.0]oct-2-ene-2-carboxylic acid. It is a lyophilized powder. It is so purified and dried that:

(i) If the cefmetazole sodium is not packaged for dispensing, its cefmetazole potency is not less than 860 micrograms and not more than 1,003 micrograms of cefmetazole activity per milligram on an anhydrous basis. If the cefmetazole sodium is packaged for dispensing, its cefmetazole potency is not less than 860 micrograms and not more than 1,003 micrograms of cefmetazole activity per milligram on an anhydrous basis and also, each container contains not less than 90 percent and not more than 120 percent of the number of milligrams of cefmetazole that it is represented to contain.

(ii) It is sterile.

(iii) It contains not more than 0.2 endotoxin units per milligram.

(iv) Its moisture content is not more than 0.5 percent.

(v) The pH of an aqueous solution containing 100 milligrams per milliliter is not less than 4.2 and not more than 6.2.

(vi) It gives a positive identity test.

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of §431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on the batch for cefmetazole potenty and content (if packaged for dispensing), sterility, bacterial endotoxins, moisture, pH, and identity.

(ii) Samples, if required by the Center for Drug Evaluation and Research:

(A) If the batch is packaged for repacking or for use as an ingredient in the manufacture of another drug:

(*1*) For all tests except sterility: 10 packages, each containing approximately 500 milligrams.

(*2*) For sterility testing: 20 packages, each containing equal portions of approximately 300 milligrams.

(B) If the batch is packaged for dispensing:

(*1*) For all tests except sterility: A minimum of 10 immediate containers of the batch.

(*2*) For sterility testing: 20 immediate containers collected at regular intervals throughout each filling operation.

(b) *Tests and methods of assay*—(1) *Potency.* Proceed as directed in § 436.216 of this chapter, using ambient temperature, an ultraviolet detection system operating at a wavelength of 214 nanometers, a 25-centimeter X 4.0- or 4.6-millimeter (inside diameter) column packed with microparticulate (5 micrometers in diameter) reversed phase packing material such as octadecyl silane bonded to silicas, a flow rate of not more than 2.0 milliliters per minute, and a known injection volume of between 10 and 20 microliters. Mobile phase, working standard and sample solutions, resolution test solution, system suitability requirements, and calculations are as follows:

(i) *Mobile phase.* Transfer 5.75 grams of ammonium dihydrogen phosphate to a 1-liter container. Add 700 milliliters of deionized water and agitate to aid dissolution. Transfer 3.2 milliliters of 40 percent tetrabutylammonium hydroxide (TBAH) in distilled water to the solution and shake. Add 280 milliliters of methanol and a range 20 to 30 milliliters of tetrahydrofuran and mix well. Adjust the pH to 4.5±0.1 with phosphoric acid. The mobile phase is 0.05*M* ammonium dihydrogen phosphate: methanol: tetrahydrofuran (700:280:20–30). It is 0.005*M* with respect to TBAH. Filter the mobile phase through a suitable filter capable of removing particulate matter to 0.5 micron in diameter and degas it

just prior to its introduction into the chromatograph.

(ii) *Preparation of working standard, sample, and resolution test solutions*—(A) *Working standard solution.* Dissolve and dilute and accurately weighed portion of the cefmetazole working standard in sufficient mobile phase to obtain a solution containing 0.2 milligram of cefmetazole activity per milliliter. Analyze this solution within 10 minutes.

(B) *Sample solutions*—(*1*) *Product not packaged for dispensing (micrograms of cefmetazole per milligram).* Dissolve an accurately weighed sample with sufficient mobile phase to obtain a solution containing approximately 0.2 milligram of cefmetazole per milliliter (estimated). Analyze this solution within 10 minutes.

(*2*) *Product packaged for dispensing.* Determine both micrograms of cefmetazole per milligram of sample and milligrams of cefmetazole per container. Use separate containers for preparation of each sample solution as described in paragraphs (b)(1)(ii)(B)(*2*)(*i*) and (*ii*) of this section.

(*i*) Micrograms *of cefmetazole per milligram.* Dissolve an accurately weighed sample with sufficient mobile phase to obtain a solution containing approximately 0.2 milligram of cefmetazole per milliliter (estimated). Analyze this solution within 10 minutes.

(*ii*) *Milligrams of cefmetazole per container.* Reconstitute the sample as directed in the labeling. Then, using a suitable hypodermic needle and syringe, remove all of the withdrawable contents if it is represented as a single-dose container; or, if the labeling specifies the amount of potency in a given volume of the resultant preparation, remove an accurately measured representative portion from each container. Dilute the solution thus obtained with sufficient distilled water to obtain a solution containing 1,000 micrograms of cefmetazole activity per milliliter (estimated). Further dilute this solution with mobile phase to obtain a solution containing 0.2 milligram of cefmetazole activity per milliliter (estimated). Analyze this solution within 10 minutes.

(C) *Resolution test solution.* Dissolve an accurately weighed portion of cefmetazole working standard in 0.01*N* sodium hydroxide to obtain a solution containing approximately 1.0 milligram of cefmetazole activity per milliliter. Heat this solution at 95 °C for 10 minutes. This procedure generates cefmetazole lactone. Dilute 1.0 milliliter of this solution to 20 milliliters with mobile phase.

(iii) *System suitability requirements*—(A) *Asymmetry factor.* Calculate the asymmetry factor (A_s), measured at a point 10 percent of the peak height from the baseline as follows:

$$A_s = \frac{a+b}{2a}$$

where:

a = Horizontal distance from point of ascent to point of maximum peak height; and

b = Horizontal distance from point of maximum peak height to point of descent.

The asymmetry factor (A_s) is satisfactory if it is not less than 0.94 and not more than 1.6.

(B) *Efficiency of the column.* From the number of theoretical plates (n) calculated as described in § 436.216(*c*)(2) of this chapter calculate the reduced plate height (h_r) as follows:

$$h_r = \frac{(L)(10{,}000)}{(n)(d_p)}$$

where:

L = Length of the column in centimeters;

n = Number of theoretical plates; and

d_p = Average diameter of the particles in the analytical column packing in micrometers.

The absolute efficiency (h_r) is satisfactory if it is not more than 20 for the cefmetazole peak.

(C) *Resolution factor.* The resolution factor (R) between the peak for cefmetazole and the peak for cefmetazole lactone (generated in situ) is satisfactory if it is not less than 3.0.

(D) *Coefficient of variation (relative standard deviation).* The coefficient of variation (S_R in percent of 5 replicate injections) is satisfactory if it is not more than 2.0 percent.

(E) *Capacity factor (k').* Calculate the capacity factor (k') for cefmetazole as follows:

$$k' = \frac{t_r - t_o}{t_o}$$

where:

t_r = Retention time of cefmetazole in minutes; and

t_o = Column dead time in minutes, which is estimated from the following equation:

$$t_o = \frac{(3.1416)(D^2)(L)(0.75)}{4F}$$

where:

D = Column diameter in centimeters;

L = Column length in centimeters;

0.75 = Average total column porosity; and

F = Flow rate in milliliters per minute.

The capacity factor (k') for cefmetazole is satisfactory if it is not less than 2.0 and not more than 8.0. If the system suitability parameters have been met, then proceed as described in § 436.216(b) of this chapter.

(iv) *Calculations*—(A) *Cefmetazole potency (micrograms of cefmetazole per milligram).* Calculate the micrograms of cefmetazole per milligram of sample as follows:

$$\text{Micrograms of cefmetazole per milligram} = \frac{A_u X P_s X 100}{A_s X C_u X (100 - m)}$$

where:

A_u = Area of the cefmetazole peak in the chromatogram of the sample (at a retention time equal to that observed for the standard);

A_s = Area of the cefmetazole peak in the chromatogram of the cefmetazole working standard;

P_s = Cefmetazole activity in the cefmetazole working standard solution in micrograms per milliliter;

C_u = Milligrams of cefmetazole sample per milliliter of sample solution; and

m = Percent moisture content of the sample.

(B) *Cefmetazole content (milligrams of cefmetazole per container).* Calculate the cefmetazole content of the container as follows:

$$\text{Milligrams of cefmetazole per container} = \frac{A_u X P_s X d}{A_s X 1{,}000}$$

where:

A_u = Area of the cefmetazole peak in the chromatogram of the sample (at a retention time equal to that observed for the standard);

A_s = Area of the cefmetazole peak in the chromatogram of the cefmetazole working standard;

P_s = Cefmetazole activity in the cefmetazole working standard solution in micrograms per milliliter; and

d = Dilution factor of the sample.

(2) *Sterility.* Proceed as directed in § 436.20 of this chapter, using the method described in § 436.20(e)(1).

(3) *Bacterial endotoxins.* Proceed as directed in the United States Pharmacopeia bacterial endotoxins test.

(4) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(5) *pH.* Proceed as directed in § 436.202 of this chapter, using an aqueous solution containing 100 milligrams per milliliter.

(6) *Identity.* Proceed as directed in § 436.211 of this chapter using a mineral oil mull prepared as described in § 436.211(b)(2).

7. New § 442.270a is added to subpart C to read as follows:

§ 442.270a Sterile cefmetazole sodium.

The requirements for certification and the tests and methods of assay for sterile cefmetazole sodium packaged for dispensing are described in § 442.70a.

Dated: February 14, 1990.

Daniel L. Michels,

Director, Office of Compliance Center for Drug Evaluation and Research.

[FR Doc. 90-4264 Filed 2-23-90; 8:45 am]

BILLING CODE 4160-01-M

21 CFR Parts 436 and 446

[Docket No. 90N-0014]

Antibiotic Drugs; Doxycycline Monohydrate Capsules

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the antibiotic drug regulations to provide for the inclusion of accepted standards for a new oral dosage form of doxycycline monohydrate, doxycycline monohydrate capsules. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective March 28, 1990; written comments, notice of participation, and request for hearing by March 28, 1990; data, information and analyses to justify a hearing by April 27, 1990.

ADDRESSES: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Peter A. Dionne, Center for Drug Evaluation and Research (HFD-520), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4290.

SUPPLEMENTARY INFORMATION: FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to a request for approval of a new oral dosage form of doxycycline monohydrate, doxycycline monohydrate capsules. The agency has concluded that the data supplied by the manufacturer concerning this antibiotic drug are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in 21 CFR Parts 436 and 446 (21 CFR parts 436 and 446) to provide for the inclusion of accepted standards for this product.

Environmental Impact

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Submitting Comments and Filing Objections

This final rule announces standards that FDA has accepted in a request for approval of an antibiotic drug. Because this final rule is not controversial and because when effective it provides notice of accepted standards, FDA finds that notice and comment procedure is unnecessary and not in the public interest. This final rule, therefore, becomes effective March 28, 1990. However, interested persons may, on or before March 28, 1990, submit comments to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this final rule may file objections to it and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file: (1) On or before March 28, 1990, a written notice of participation and request for hearing, and (2) on or before April 27, 1990, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 314.300. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the heading of this document and filed with the Dockets Management Branch.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grant or denial of a hearing are contained in 21 CFR 314.300.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Parts 436 and 446

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 436 and 446 are amended as follows:

PART 436—TESTS AND METHODS OF ASSAY OF ANTIBIOTIC AND ANTIBIOTIC-CONTAINING DRUGS

1. The authority citation for 21 CFR part 436 continues to read as follows:

Authority: Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

2. Section 436.215 is amended by alphabetically adding a new entry to the table in paragraph (b) and by adding new paragraph (c)(12) to read as follows:

§ 436.215 Dissolution test.

* * * * *

(b) * * *

Dosage Form	Dissolution medium	Rotation rate [1]	Sampling times(s)	Apparatus
* * * * * * *				
Doxycycline monohydrate hydrochloric acid capsules	900 mL 0.1*N* hydrochloric acid	75	60 min	2
* * * * * * *				

[1] Rotation rate of basket or paddle stirring element (revolutions per minute).

(c) * * *

(12) *Doxycycline monohydrate.* Proceed as directed in paragraph (c)(1) of this section, except use the doxycycline standard.

* * * * *

PART 446—TETRACYCLINE ANTIBIOTIC DRUGS

3. The authority citation for 21 CFR Part 446 continues to read as follows:

Authority: Sec. 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357).

§ 446.121a [Redesignated from § 446.121]

4. Section 446.121 is redesignated as § 446.121a and new §§ 446.121 and 446.121b are added to read as follows:

§ 446.121 Doxycycline monohydrate oral dosage forms.

§ 446.121b Doxycycline monohydrate capsules.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Doxycycline monohydrate capsules are composed of doxycycline monohydrate and one or more suitable and harmless lubricants and diluents enclosed in a gelatin capsule. Each capsule contains doxycycline monohydrate equivalent to 100 milligrams of doxycycline. Its potency is satisfactory if it is not less than 90 percent and not more than 120 percent of the number of milligrams of doxycycline that it is represented to contain. The moisture content is not more than 5.5 percent. It passes the dissolution test. It passes the identity test. The doxycycline monohydrate used conforms to the standards prescribed by § 446.21.

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on:

(A) The doxycycline monohydrate used in making the batch for potency, moisture, pH, doxycycline content, identity, and crystallinity.

(B) The batch for potency, moisture, dissolution, and identity.

(ii) Samples, if required by the Center for Drug Evaluation and Research:

(A) The doxycycline monohydrate used in making the batch: 10 packages, each containing approximately 300 milligrams.

(B) The batch: A minimum of 100 capsules.

(b) *Tests and methods of assay*—(1) *Doxycycline potency.* Proceed as directed in § 436.216 of this chapter, using ambient temperature, an ultraviolet detection system operating at a wavelength of 280 nanometers, a 4.6-millimeter X 3-centimeter guard column containing 5- to 10-micrometer diameter octyl silane chemically bonded to totally porous microsilica particles, a 3.9-millimeter X 30-centimeter analytical column packed with octadecyl silane chemically bonded to porous silica or ceramic microparticles, 5 to 10 micrometers in diameter, a flow rate of 1.5 milliliters per minute, and a 10-microliter loop injector. Reagents, working standard and sample solutions, system suitability requirements, and calculations are as follows:

(i) *Reagents*—(A) *0.1M sodium phosphate buffer.* Prepare a solution containing 13.8 grams of monobasic sodium phosphate per liter of distilled water.

(B) *Mobile phase.* Mix 450 milliliters of 0.1*M* monobasic sodium phosphate and 550 milliliters of methanol. Add 3 milliliters of *N,N*-dimethyl-*n*-octylamine. Adjust the pH to 8.0 with 5*N* sodium hydroxide. Filter the mobile phase through a suitable glass filter or equivalent that is capable of removing particulate contamination to 1 micron in diameter. Degas the mobile phase just prior to its introduction into the chromatograph pumping system.

(ii) *Preparation of working standard, sample, and resolution test solutions*—(A) *Working standard solution.* Dissolve an accurately weighed portion of the doxycycline hyclate working standard in sufficient 0.1*N* hydrochloric acid to obtain a known concentration of about 1,000 micrograms of doxycycline per milliliter. Further dilute with distilled water to a concentration of 40 micrograms of doxycycline activity per milliliter. Filter through a membrane filter of 0.5 micron or finer porosity.

(B) *Sample solution.* Remove, as completely as possible, the contents of a representative number of capsules. Mix the combined contents and transfer an accurately weighed portion of the powder, equivalent to about 100 milligrams of doxycycline, to a 100-milliliter volumetric flask. Add 20 milliliters of 0.1*N* hydrochloric acid and sonicate for 5 minutes. Dilute to mark with 0.1*N* hydrochloric acid. Further quantitatively dilute an aliquot of this solution with distilled water to a concentration of 40 micrograms of doxycycline activity per milliliter (estimated). Filter through a membrane filter of 0.5 micron or finer porosity. Content uniformity analyses may be obtained from sample solutions prepared as above except that the contents of one capsule are quantitatively transferred to the 100-milliliter volumetric flask.

(C) *Resolution test solution.* Dissolve 50 milligrams of doxycycline in 25 milliliters of distilled water. Pipet 5 milliliters of this solution into a 25-milliliter volumetric flask and heat on a steam bath for 60 minutes. Transfer the contents of the flask to a small beaker and evaporate to dryness. Dissolve the residue in distilled water, transfer to a 25-milliliter volumetric flask, dilute to mark with distilled water, mix, and filter through Whatman No. 1 filter paper. Use this solution to determine the resolution factor.

(iii) *System suitability requirements*—(A) *Asymmetry factor.* Calculate the asymmetry factor (A_s), measured at a point 5 percent of the peak height from the baseline, as follows:

$$A_s = \frac{a+b}{2a}$$

where:

a=Horizontal distance from point of ascent to a point of a maximum peak height; and

b=Horizontal distance from the point of maximum peak height to point of descent.

The asymmetry factor (A_s) is satisfactory if it is not less than 1.4 and not more than 2.0

(B) *Efficiency of the column.* From the number of theoretical plates (n) calculated as described in § 436.216(c)(2) of this chapter calculate the reduced plate height (h_r) as follows:

$$h_r = \frac{(L)(10{,}000)}{(n)(d_p)}$$

where:

L=Length of the column in centimeters;

n=number of theoretical plates; and

d_p=Average diameter of the particles in analytical column packing in micrometers.

The absolute efficiency (h_r) is satisfactory if it is not more than 37.5 for the doxycycline peak.

(C) The resolution (R) between peaks for doxycycline and epi-doxycycline is satisfactory if it is not less than 1.5.

(D) *Coefficient of variation (relative standard deviation).* The coefficient of variation (S_R in percent) of 5 replicate injections is satisfactory if it is not more than 2.0 percent.

(E) *Capacity factor (k').* Calculate the capacity factor (k') for doxycycline as follows:

$$k' = \frac{t_r - t_o}{t_o}$$

where:

t_r = Retention time of doxycycline in minutes; and

t_o = Column dead time in minutes, which is estimated from the following equation:

$$t_o = \frac{(3.1416)(D^2)(L)(0.75)}{4F}$$

where:

D = Column diameter in centimeters;

L = Column length in centimeters;

0.75 = Average total column porosity; and

F = Flow rate in milliliters per minute.

The capacity factor (k') for doxycycline is satisfactory if it is not less than 1.5 and not more than 2.5. If the system suitability requirements have been met, then proceed as described in § 436.216(b) of this chapter. Alternate chromatographic conditions are acceptable provided reproducibility and resolution are comparable to the system described. However, the sample preparation described in paragraph (b)(1)(ii)(B) of this section should not be changed.

(iv) *Calculations.* Calculate the doxycycline content as follows:

$$\text{Milligrams of doxycycline per capsule} = \frac{A_u \times P_s \times d}{A_s \times 1{,}000 \times n}$$

where:

A_u = Area of the doxycycline peak in the chromatogram of the sample (at a retention time equal to that observed for the standard);

A_s = Area of the doxycycline peak in the chromatogram of the working standard;

P_s = Doxycycline activity in the doxycycline working standard solution in micrograms per milliliter;

d = Dilution factor of the sample; and

n = Number of capsules in the sample assayed.

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *Dissolution.* Proceed as directed in § 436.215 of this chapter. The quantity Q (the amount of doxycycline dissolved) is 85 percent at 60 minutes.

(4) *Identity.* The high-pressure liquid chromatogram of the sample determined in paragraph (b)(1) of this section compares qualitatively to that of the doxycycline working standard.

Dated: February 14, 1990.

Daniel L. Michels,

Director, Office of Compliance, Center for Drug Evaluation and Research.

[FR Doc. 90-4263 Filed 2-23-90; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[7-89-62]

Drawbridge Operation Regulations; Atlantic Intracoastal Waterway, Florida

AGENCY: Coast Guard, DOT.

ACTION: Final Rule-Revocation.

SUMMARY: This amendment revokes the regulations for the Harris Saxon drawbridge, mile 846.5 at New Smyrna Beach because the bridge has been removed. Notice and public procedure have been omitted from this action due to the removal of the bridge concerned.

EFFECTIVE DATE: This rule becomes effective on March 28, 1990.

FOR FURTHER INFORMATION CONTACT: Walt Paskowsky (305) 536-4103.

SUPPLEMENTARY INFORMATION: Drafting information: The drafters of this rule are Mr. Walt Paskowsky, Bridge Administration Specialist, project officer and Lieutenant Commander D. G. Dickman, project attorney. This action has no economic consequences. It merely revokes regulations that are now meaningless because they pertain to a drawbridge that no longer exists. Consequently this action is considered to be non-major under Executive Order 12291 and nonsignificant under Department of Transportation regulatory policies and procedures (44 FR 11034, February 26, 1979). Since there is no economic impact, a full regulatory evaluation is unnecessary. Because no notice of proposed rulemaking is required under 5 U.S.C. 553, and because this action will not have a significant impact on a substantial number of small entities, this rulemaking is exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b).

List of Subjects in 33 CFR Part 117

Bridges.

In consideration of the foregoing, part 117 of title 33, Code of Federal Regulations is amended as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 USC 499; 49 CFR 1.46; 33 CFR 1.05-1(g).

§ 117.261 [Removed]

2. Section 117.261(i) is removed.

Dated: February 12, 1990.

J.L. Linnon,

Captain, U.S. Coast Guard, Commander, Seventh Coast Guard District, Acting.

[FR Doc. 90-4246 Filed 2-23-90; 8:45 am]

BILLING CODE 4910-14-M

33 CFR Part 165

[Reg. 90-02]

COTP Los Angeles/Long Beach, CA; Safety Zone Regulations; Ports of Los Angeles/Long Beach, CA

AGENCY: Coast Guard, DOT.

ACTION: Emergency rule.

SUMMARY: The Coast Guard is establishing a safety zone within a 50 yard distance of the pollution containment booms deployed at, in, or near Alamitos Bay, Anaheim Bay, and Newport Bay while pollution mitigation efforts relating to the T/V American Trader crude oil discharge continue.

This zone is needed to protect sensitive inland areas from environmental hazards associated from oil pollution. Entry into this zone is prohibited unless authorized by the Captain of the Port or representatives of the Captain of the Port on scene.

EFFECTIVE DATES: This regulation becomes effective on 9 February 1990 and remains in effect until terminated.

FOR FURTHER INFORMATION CONTACT: Lt. R. L. Booth at (213) 499-5580.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rule making was not published for this regulation and it is being made effective in less than 30 days after Federal Regulation publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest since immediate action is needed to prevent potential damage to the water and/or shore areas of Alamitos Bay, Anaheim Bay, and Newport Bay while pollution mitigation efforts relating to the T/V American Trader crude oil discharge of 7 February 1990 continue.

Drafting Information

The drafters of this regulation are Lt. R. L. Booth, project officer for the Captain of the Port, and LCDR G. R. Wheatly, project attorney, Eleventh Coast Guard District Legal Office.

Discussion of Regulation

The hazard requiring this regulation resulted from the accidental discharge of approximately 9458 barrels of crude oil on 7 February 1990. This safety zone is being established to ensure the protection of the environment in, on, or around the Alamitos Bay, Anaheim Bay, and Newport Bay while pollution mitigation efforts relating to the T/V American Trader crude oil discharge continue. This regulation is issued pursuant to 33 U.S.C. 1225 and 1231 as set out in the authority citation for all of part 165.

List of Subjects in 33 CFR Part 165

Harbors Marine Safety, Navigation (water), Security measures, Vessels, Waterways.

Regulation

In consideration of the foregoing, subpart C of part 165 of title 33, Code of Federal Regulations, is amended as follows:

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1225 and 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5

2. A new § 165.T1103 is added to read as follows:

§ 165.T1103 Safety Zone: Port of Los Angeles/Long Beach, CA.

(a) *Location.* The following area is a safety zone: Within 50 yards of pollution containment booms deployed at, in or near Alamitos Bay, Anaheim Bay, and Newport Bay while pollution mitigation efforts relating to the T/V American Trader crude oil discharge continue.

(b) *Effective Date.* This regulation becomes effective on 9 February 1990 and remains in effect until terminated.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port.

Dated: February 20, 1990.

J. C. Card,

Captain, U.S. Coast Guard, Captain of the Port, Los Angeles/Long Beach.

[FR Doc. 90–4247 Filed 2–23–90; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[PP8F3640/R1057; FRL–3690–4]

Pesticide Tolerance for 2-[1-(Ethoxyimino)Butyl]-5-[2-(Ethylthio)Propyl]-3-Hydroxy-2-Cyclohexene-1-One

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document establishes tolerances for the the combined residues of the herbicide 2-[1-(ethoxyimino)butyl]-5-[2-(ethylthio)propyl]-3-hydroxy-2-cyclohexene-1-one(sethoxydim) and its metabolites containing the 2-cyclohexene-1-one moiety, calculated as parent, in or on the raw agricultural commodities (RACs) dry beans at 20.0 parts per million (ppm), succulent beans at 5.0 ppm, bean forage at 10.0 ppm, bean hay at 50 ppm, dry peas at 40.0 ppm, succulent peas at 10.0 ppm, pea forage at 20.0 ppm, pea hay at 40.0 ppm, eggs at 2.0 ppm, and poultry meat byproducts at 2.0 ppm. This regulation was requested by BASF Wyandotte Corp. and proposes to establish the maximum permissible level for residues of the hebicide in or on these RACs.

DATES: This regulation becomes effective February 26, 1990.

ADDRESSES: Written objections, identified by the document control number, [PP8F3640/R1057], may be submitted to: Hearing Clerk (A–110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Robert J. Taylor, Product Manager (PM) 25, (H7505C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 245, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)–557–1800.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of December 27, 1989 (54 FR 53122), EPA issued a proposed rule that gave notice that BASF Wyandotte Corp., Chemical Division, 100 Cherry Hill Rd., Parsippany, NJ 07054, had submitted pesticide petition (PP) 8F3640 to EPA.

This petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose to amend 40 CFR 180.412 by establishing a tolerance for the residues of the herbicide 2-[1-(ethoxyimino)butyl]-5-[2-(ethylthio)propyl]-3-hydroxy-2-cyclohexene-1-one (sethoxydim) and its metabolites containing the 2-cyclohexene-1-one moiety in or on dry beans at 20.0 ppm, beans, forage at 10.0 ppm, beans, hay at 50 ppm, succulent beans at 5.0 ppm, eggs at 2.0 ppm, dry peas at 40.0 ppm, peas, forage at 20.0 ppm, peas, hay at 40.0 ppm, peas, succulent at 10.0 ppm, and poultry meat byproducts at 2.0 ppm.

There were no comments or requests for referral to an advisory committee received in response to the proposed rule.

The data submitted in the petition and other relevant material have been evaluated and discussed in the proposed rule. Based on the data and information considered, the Agency concludes that the tolerances will protect the public health. Therefore, the tolerances are established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the **Federal Register** of May 4, 1981 (46 FR 24950).

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 7, 1990.

Douglas D. Campt,

Director, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 346a and 371.

2. In § 180.412(a), by revising the entries for eggs and poultry meat byproducts (mbyp) and by adding and alphabetically inserting entries for beans, dry, forage, hay, and succulent and peas, dry, forage, hay, and succulent, to read as follows:

§ 180.412 2-[1-(Ethoxyimino)butyl]-5-[2-(ethylthio)propyl]-3-hydroxy-2-cyclohexene-1-one; tolerances for residues.

(a) * * *

Commodities	Parts per million
* * * * *	
Beans	20.0
Beans, forage	10.0
Beans, hay	50.0
Beans, succulent	5.0
* * * * *	
Eggs	2.0
* * * * *	
Peas, dry	40.0
Peas, forage	20.0
Peas, hay	40.0
Peas, succulent	10.0
* * * * *	
Poultry, mbyp	2.0
* * * * *	

* * * * *

[FR Doc. 90-4297 Filed 2-23-90; 8:45 am]

BILLING CODE 6560-50-D

40 CFR Parts 260, 261, 262, 264, 265, 268, 270 and 271

[SWH-FRL-3725-8]

Hazardous Waste Management System: Land Disposal Restrictions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Response to court remand.

SUMMARY: On November 7, 1986, EPA promulgated the first set of land disposal restriction regulations, including treatment standards based on the Best Demonstrated Available Technology (BDAT). In doing so, the Agency rejected a proposed approach in which treatment standards would be capped by risk-based screening levels. A number of groups filed petitions for review which challenged EPA's choice of technology-based standards over risk-based screening levels. On September 15, 1989, a panel from the Court of Appeals for the District of Columbia Circuit found that EPA's selection of technology-based treatment standards was reasonable based upon interpretation of section 3004(m) of the Resource Conservation and Recovery Act (RCRA). However, the panel also concluded that EPA failed to adequately explain its policy preference for technology-based standards over risk-based screening levels and the Court remanded the rule to the Agency to either clarify the selection or withdraw the final rule. This notice is the response to the Court's order.

EFFECTIVE DATE: This response is effective on February 26, 1990.

ADDRESSES: The OSW docket is located at the following address, and is open from 9:00 to 4:00, Monday through Friday, excluding Federal holidays: EPA RCRA Docket (M-2427) (OS-305), 401 M Street, SW., Washington, DC 20460. The public must make an appointment to review docket materials by calling (202) 475-9327. The public may copy a maximum of 100 pages from any regulatory docket at no cost. Additional copies cost $0.20 per page.

FOR FURTHER INFORMATION: Contact the RCRA Hotline for general information at (800) 424-9346 (toll-free) or (202) 382-3000 locally.

For information on specific aspects of this notice, contact Steven Silverman, Office of Solid Waste (OS-333), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-7706.

SUPPLEMENTARY INFORMATION:

I. Background

On November 7, 1986, EPA promulgated the first set of land disposal restrictions and treatment standards, and further set out the framework of regulations that explained and implemented the Land Disposal Restrictions Program. See 51 FR 40572. Perhaps the most important feature of these regulations was the Agency's determination to base section 3004(m) treatment standards for prohibited hazardous wastes on performance of the Best Demonstrated Available Technology (BDAT), i.e., to adopt treatment standards that are technology-based. At proposal, the Agency had solicited comment on an alternative whereby technology-based treatment standards would be capped by risk-based screening levels, which incorporated initial toxicity levels for hazardous constituents plus predictive modeling based on assumptions of migration to a point of exposure. See 51 FR 1610-12. In rejecting this screening level approach in the final rule, the Agency alluded to the many adverse comments it had received which stressed the uncertainties associated with EPA's proposed screening level approach which would have capped hazardous waste treatment levels with risk-based levels reflecting predictive modeling of waste behavior in land disposal environments. The Agency also referred to legislative history that indicated that the section 3004(m) treatment standards were to be technology-based. EPA then adopted a final rule and methodology whereby treatment standards are to be based on performance of BDAT and are not to be capped in the land disposal restriction regulations by the proposed screening levels. See 51 FR 40578. The Agency stated that "the technology-based approach adopted in the final rule, although not the only approach allowable under the law, better mirrors the intent of Congress." See Administrative Record p. 36, 316 (Response to Comment Background Document).

A number of industry petitioners filed petitions for review which challenged the choice of technology-based treatment standards as being contrary to section 3004(m)'s command to establish treatment standards "which substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." In a recent opinion, a panel from the Court of Appeals for the District of Columbia Circuit held that the literal language of section 3004(m) does not mandate a risk-based approach, and that the Agency's interpretation that the treatment standards were to be technology-based was reasonable. See *Hazardous Waste Treatment Council* v. *EPA*, 886 F.2d 355 (D.C. Cir. Sept. 15, 1989) ("*HWTC III*"), *id.* at 361-64. The Court concluded further, however, that EPA had failed to adequately explain its policy preference for technology-based treatment standards, over the proposed approach based on screening levels. *Id.* at 364-66. Judge Silberman, concurring, also found that section 3004(m) does not mandate risk-based treatment standards (*id.* at 371-72), but would not have addressed the further issue of whether EPA's choice of a technology-based regime was reasonable given the inadequacy of the Agency's explanation of its choice. *Id.* at 373-74.

The Court consequently remanded the rule to the Agency in order that the Agency either "clarify its reasons for adopting the Final Rule in preference to the Proposed Rule", or to withdraw the Final Rule. *Id.* at 371. The present **Federal Register** Notice constitutes EPA's response to the Court's opinion.

II. EPA's Ultimate Preferred Resolution

Before addressing the issue of justification of EPA's choice of technology-based BDAT in the final solvents and dioxin rule, EPA wishes to address the ultimate resolution it envisions for the section 3004(m) treatment standards. EPA accepts, and agrees with, the Court's admonition that EPA may not establish treatment standards "wholly without regard to whether there might be a threat to man or nature." See 886 F.2d at 362; also concurring opinion, *id.* at 372. EPA believes that the best way ultimately to achieve this objective is not to require further treatment of prohibited hazardous wastes containing threshold levels of hazardous constituents at which listed wastes themselves would no longer be deemed hazardous, within the broad meaning of RCRA section 3001.[1]

EPA is presently unable to promulgate such levels, however. This is an issue that has bedeviled the Agency for years and one that remains an Agency priority. Many of the very uncertainties discussed below that determine the Agency's policy preference for technology based standards instead of the screening level approach proposed initially likewise have not been resolved fully enough to promulgate threshold concentration levels.

EPA's eventual intention to use threshold hazardous waste levels concurrently under development to cap the section 3004(m) treatment standards still leaves the question of which standards to apply in the interim. (If no treatment standards are in effect, then the various statutory prohibitions in sections 3004 (d), (e), and (on May 8, 1990) (g) ("hammers") would take effect, and most hazardous waste disposal would thus be prohibited unless it occurs in a land disposal unit determined by EPA to satisfy the statutory "no migration" test. Since this would leave most hazardous waste without a legal management option, EPA believes it imperative to have treatment standards in place.) The specific issue requiring resolution is for EPA to explain why in the solvent and dioxin rule it preferred technology-based standards to the proposed screening level approach, or to withdraw the promulgated regulation. See 886 F.2d at 371. EPA has determined that the soundest choice for the interim is to retain its original choice of technology-based teratment standards based on performance of BDAT. The Agency's reasons are based on both legal analysis and the Agency's determination that its choice of options is consistent with and furthers the Congressional intent and policy objectives in promulgating the land disposal restrictions provisions. These points are discussed below.

III. Choice of BDAT Versus the Proposed Screening Level Approach

A. Legal Analysis

It is now established that section 3004(m) does not dictate that treatment standards be either technology-based or risk-based. See 886 F.2d at 361–64. Clearly, the requirement in section 3004(m) that treatment standards minimize threats to human health and the environment is ambiguous as to the precise extent of treatment.

Even more important in the Agency's view, is the indication that Congress expected the Agency to adopt a different approach in establishing treatment standards than the approach used heretofore by the Agency in establishing subtitle C regulatory standards. Those standards implement the statutory directive to establish hazardous waste management standards at a level "as may be necessary to protect human health and the environment." See, *e.g.*, section 3004(a). EPA has implemented this statutory standard by developing regulations that are based on ascertaining a level of risk that EPA deems acceptable and crafting controls that seek to ensure that this level of risk is not exceeded.

Section 3004(m), in contrast, does not require that treatment standards be protective of human health and the environment, but rather commands that those standards ultimately substantially diminish waste toxicity or mobility in order that "short-term and long-term threats to human health and the environment be minimized." EPA believes that this language can reasonably be interpreted to require more than the normal subtitle C regulatory command that standards be those necessary to protect human health and the environment. This conclusion is reinforced by the many statutory provisions that were part of the 1984 amendments stressing the inherent uncertainties associated with assessing the safety of land disposal of hazardous wastes. RCRA sections 1002(b)(7), 3004(d)(1)(A), 3004(e)(1)(A), 3004(g)(5), and the Congressional determination that the only protective land disposal units are those for which EPA has determined, with a "reasonable degree of certainty," that "there will be no migration of hazardous constituents from the disposal unit for as long as the wastes remain hazardous."

The legislative history of section 3004(m) also provides support for the interpretation that Congress intended something other than treatment standards reflecting EPA-determined acceptable levels of risk normally used in establishing subtitle C regulations. Section 3004(m) was adopted as an amendment to the Senate bill (S. 757). It replaced a provision in the House bill (H.R. 2867) that specifically authorized EPA to mek risk-based determinations in deciding whether particular hazardous wastes should be prohibited from land disposal. It also replaced the Senate Committee bill which would have required the Agency to establish methods of treatment "whnich are necessary before such method or methods of disposal of * * * hazardous waste would be protective of human health and the environment." See S. 757, section 3004(b)(7), printed at S. Rep. No. 284, 98th Cong. 2d Sess. 86. The legislative history to the amendment ultimately adopted states instead that "the requisite levels of [sic] methods of treatment established by the Agency should be the best that has [sic] been demonstrated to be achievable * * * The intent here is to require utilization of available technology in lieu of continued land disposal without prior treatment." See 130 Cong. Rec. S. 9178 (daily ed. July 25, 1984) (statement of Sen. Chaffee).

It is true that some of the legislative history is not always specific regarding the extent of pretreatment to be required as a precondition to land disposal. Nowhere in the legislative history,

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[1] EPA also agrees with the Court [886 F.2d at 362–64 and 375 (concurring opinion)], that standards developed under statutory provisions that differ from section 3004(m) in that they direct EPA to determine acceptable levels of risk do not automatically circumscribe the permissible level for the section 3004(m) treatment standards. Nor are standards that are applied in particularized circumstances, such as RCRA clean closures, no migration determinations, and delistings, necessarily the same levels that EPA would conclude on a generally-applicable basis minimize threats to human health and the environment.

EPA notes further, that in construing the language of section 3004(m), which requires that treatment assure that "short-term and long-term threats to human health and the environment are minimized", the Agency does not believe that this standard requires the elimination of every conceivable threat posed by disposal of a prohibited hazardous waste. Rather, Congress intended that the treatment standards have some flexibility. See Sen. Chafee's floor statement introducing the amendment that became section 3004(m): "It is not intended that every waste receive repetitive or ultimate levels of treatment, nor must all inorganic constituents be reclaimed." See 130 Cong. Rec. S. 9178 (daily ed. July 25, 1984). (EPA notes in addition, however, the Congressional preference for destruction of organic constituents, see Cong. Rec. S. 9179 (daily ed. July 25, 1984) (statement of Sen. Chaffee), and believes that treatment standards based on thermal destruction of organics properly reflect this preference.)

however, is EPA directed to rely on the normal subtitle C levels of acceptable risk. At a minimum, the materials described here show that Congress did not provide clear guidance on the meaning of 'minimize threats'. Hence, EPA believes that it has discretion to adopt an interpretation that emphasizes the need for certainty in reducing the risks of and disposal of hazardous wastes and that allows EPA to prefer technology-based standards over capping levels that incorporate unacceptable levels of uncertainty.

B. EPA's Policy Preference

EPA's interpretation of section 3004(m) also serves Congress' goals. EPA views Congress' objectives in adopting the Land Disposal Restrictions Program as seeking to assure safety by removing as many of the uncertainties associated with land disposal of hazardous waste as possible, and to a lesser degree as forcing use of existing treatment capacity. See RCRA sections 1002(b)(7), 3004(d)(1), (e)(1), (g)(1), and S. Rep. No. 284, 98th Cong. 1st Sess. at 19. Congress also intended that "reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes." See section 1002(b)(7).

These objectives are well served by retaining the technology-based treatment standards that the Agency has implemented until EPA can establish acceptability certain threshold levels that identify constituent concentration levels at which wastes are not hazardous. The "long-term uncertainties associated with land disposal" (section 3004(d)(1)(A)) are reduced by using treatment technologies whose performance is objective rather than predictive. Technology-based standards also better further the Congressional goal of using existing treatment capacity. This is because the risk-based screening level approach proposed initially would have served to cap treatment, and thus at least to some extent, decreased use of treatment capacity. See 51 FR 1612–13. For the same reason, use of the screening level approach would not have minimized hazardous waste land disposal to the same extent as technology-based standards because more wastes could permissibly be land disposed without treatment (or with less treatment).

The legislative history also shows that another of Congress' objectives was the promulgation of treatment standards that were at least roughly equivalent (in terms of stringency of control) to standards required under the Clean Water Act and the Clean Air Act. The Senate Report provides:

> A requirement for treatment of hazardous constituents under other statutes is another factor that may be considered. For example, the Administrator should impose, as a condition of land disposal, a treatment requirement that is consistent with categorical pretreatment standards required pursuant to the Clean Water Act. Increased regulation under the Solid Waste Disposal Act should complement and reciprocally re-enforce regulations under the Clean Water and Clean Air Acts. It make little sense to improve or accelerate regulations under those statutes only to have environmental goals frustrated by loopholes allowing less stringent treatment under the Solid Waste Disposal act.
>
> S. Rep. No. 284 at 16.

The categorical pretreatment standards under the Clean Water Act cited above are technology-based regulations.[2] The Clean Air Act also establishes regulatory programs—the New Source Performance Standards and Prevention of Significant Deterioration—that are technology based. EPA is concerned that the screening levels proposed in 1986, with their reliance on predictive modelling to simulate dispersion and attenuation in the environment, might result in levels of control that are significantly less stringent than the levels imposed under either of these other programs. Such a result would clearly fail to serve this particular objective.

There are also other problems with the proposed approach which cause EPA to prefer the technology-based rule adopted. The proposed rule attempted to take into account the waste's behavior in the land disposal environment after it is land disposed. Since promulgation of the final rule in November 1986, EPA has in fact abandoned the predictive model that was used as the basis for screening levels due to inadequacies relating to wastes' migratory potential in landfill environments, and aquifer dispersion characteristics. Because the screening levels proposed in 1986 incorporated a modeling approach to dilution and attenuation in the environment based on a model which EPA now believes is superseded, EPA views promulgation of those levels as insufficiently certain at this time to satisfy Congress' immediate goals for land disposal treatment standards.

Even without predictive modeling, uncertainties currently remain relating to assessing wastes' toxicity. See generally 51 FR at 1714–20 (January 14, 1986). These problems, while not insurmountable over a long term have posed difficulties in developing threshold levels in the short-term that could be used to assess when threats of hazardous waste land disposal are minimized with enough assurance to cap treatment standards. The difficulties that remain involve dealing with the large number of hazardous constituents controlled under the RCRA subtitle C program (which exceed by several times even the extensive list of priority pollutants under the Clean Water Act), assessing and possibly devising exposure scenarios for the air and environmental (rather than human) exposure pathways, developing analytical detection methods for over 100 hazardous constituents, and determining an approach when threshold levels are less than the pollutant's limit of detection.

EPA must grapple with each of these issues, determining which are substantial enough to play a significant role in the selection of any capping levels, and how to work with the factors that it finds to be significant. Although EPA has begun work on a rule that will consider these issues, that rule is not yet ready for proposal, much less promulgation.

EPA prefers to further the statutory objective of assuring safety by eliminating as much of the inherent uncertainty of hazardous waste land disposal by retaining the current approach of technology-based treatment standards until it develops concentration thresholds for determining when wastes are hazardous. It therefore is the Agency's decision to retain treatment standards that are based on performance of BDAT until it develops acceptably certain threshold concentration levels. This approach not only better mirrors Congressional intent, but better fulfills the Congressional objectives in promulgating the land disposal restrictions provisions.[3]

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[2] Senator Chafee later clarified, however, that section 3004(m) does not mandate a technology-forcing approach such as the Best Available Technology approach of the Clean Water Act. 130 Cong. Rec. S. 9178 (daily ed. July 25, 1984).

[3] EPA notes further that even if it were to choose to switch immediately to a risk-based approach to establishing treatment standards, the existing treatment standards for solvent and dioxin wastes were not established "wholly without regard to whether there might be a threat to human health and the environment" (886 F.2d at 362), and thus would be permissible. To the best of the Agency's present knowledge, the standards are not established below levels at which there are threats to human health and the environment. The standards for both solvent and dioxin nonwastewaters reflect the level of potentially leachable constituent in the waste (as measured by the Toxicity Characteristic Leaching Procedure (TCLP) protocol). Thus, the standards could allow disposal of wastes containing high concentrations of

Continued

IV. Opportunity for Notice and Comment

Although EPA is issuing this notice without having afforded all interested persons an opportunity for comment, the Agency does not believe that such an opportunity is required or warranted. In the first place, EPA directly solicited comment from all of the parties to the litigation, received their written (and, in some cases, oral) comments, and considered these comments in preparing this response. Second, the Agency does not believe that this notice is a "rule" subject to the Administrative Procedure Act's (APA) notice and comment requirements. The notice creates no new requirements, but reaffirms existing standards and supplies a more fully explicated basis for those standards. Moreover, even if this notice should be considered an APA rule, EPA considers further opportunity to comment to be unnecessary, within the meaning of 5 U.S.C. 553(b)(3)(B), because there was ample opportunity to comment on all of these issues in the underlying 1986 rulemaking. In addition, EPA would be unable to meet the deadline afforded by the Court were it to formally solicit comment and respond to the comment before issuing this notice. Failure to meet the deadline could result in suspension of existing treatment standards and activating the statutory hammer provisions for at least dioxin and solvent wastes, leaving no legal means of land disposing these wastes (except in no-migration land disposal units, presently a virtually null set). RCRA section 3004(e)(1). Consequently, the Agency finds that even if this Notice should constitute a rule, there is a good cause for issuing it without opportunity for prior comment.

Dated: February 12, 1990.

William K. Reilly,

Administrator.

[FR Doc. 90-4287 Filed 2-23-90; 8:45 am]

BILLING CODE 6560-50-M

solvents and dioxins, and futher, nonredundant minimization of threats could be achieved by actually destroying the hazardous constitutents and removing them from the environment. In addition, with respect to solvents, EPA continues to find that these standards are warranted because solvents (by definition) mobilize other hazardous constituents. In fact, EPA's most widely applicable tool for assessing the hazardousness of toxic wastes, the EP toxicity characteristic (as well as the proposed TCLP), assumes disposal in an environment where a waste is not exposed to solvents (or to chemicals with solvent properties). If solvents in the land disposal environment are not minimized, a fundamental premise of the characteristic is undermined, and land disposed wastes will be exposed to higher concentrations of mobilizing chemicals. See 51 FR 21532 (June 13, 1986). A further factor warranting minimization of land disposed solvents is that they can damage land disposal unit liner systems. See 51 FR 1621. Although the concentration levels, and conditions under which the F001-F005 solvents (either singly or as a group) could mobilize other co-disposed waste constituents or damage land disposal unit liner systems is not reliably established, EPA believes it would be warranted in retaining the present controls to guard against these concerns. Thus, EPA finds that the technology-based treatment standards for solvents do not force treatment below levels at which there is no threat to human health and the environment.

EPA notes further that its existing rules (40 CFR 260.20) allow persons to petition the Agency to amend or promulgate new regulations. These procedures are open to persons believing they can demonstrate that the standards for solvents are established "wholly without regard to whether there might be a threat to human health and the environment."

With respect to the dioxins, the treatment levels are orders of magnitude above levels that warrant listing the wastes as hazardous. See 51 FR 30271 (July 25, 1985); 53 FR 7903 (March 11, 1899); 53 FR 20103 (June 2, 1988); 54 FR 27167 (June 28, 1989), and are thus obviously greater than levels at which the Agency could reasonably determine that threats to human health and the environment are minimized.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 84-231; FCC 90-52]

Radio Broadcasting Services; Implementation of BC Docket No. 80-90 To Increase the Availability of FM Broadcast Assignments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document describes the extent of the remedial action that the Commission will initiate pursuant to the decision of the United States Court of Appeals in *Reeder* v. *FCC.*, 865 F.2d 1298 (D.C. Cir. 1989), in which the court rejected three policies adopted by the Commission in this docket.

EFFECTIVE DATE: April 9, 1990.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Michael Ruger, Mass Media Bureau, (202) 632-6302.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Memorandum Opinion and Order, MM Docket No. 84-231, adopted February 1, 1990, and released February 20, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC, 20037.

Summary of Memorandum Opinion and Order

1. This *Memorandum Opinion and Order* is the first step in complying with the decision of the United States Court of Appeals in *Reeder* v. *FCC*, 865 F.2d 1298 (D.C. Cir. 1989). The court struck down three policies implemented in this proceeding on the grounds that they had been adopted without proper notice and comment procedures, and remanded the proceeding for appropriate action consistent with its opinion.

2. First, the court struck down the Commission's refusal to consider counterproposals unless they fell within certain limited categories (hereinafter the "counterproposals limitations"). Second, the court struck down the Commission's subsequent refusal to consider proposals advanced after the *First Report and Order* in MM Docket 84-231, 50 FR 3514 (1985), but before the application filing window for the new allotment had closed, that required as a component part of the proposal a channel substitution for a Docket 84-231 allotment (hereinafter the "no substitutions policy"). Third, by implication, the court struck down that portion of the no substitutions policy that allows a petitioner to advance a proposal involving a channel substitution for a Docket 84-231 allotment only if the petitioner can demonstrate that the channel substitution meets the Commission's minimum spacing requirements at the site specified in each of the application filed for the allotment (hereinafter the "post-window substitutions policy").

3. We have decided that initiation of a rule making proceeding to consider adoption of these policies is not justified. The policies were intended to apply only to the allotments proposed in Docket 84-231. However, the initial comment date has passed for all of the allotments in Docket 84-231 and any counterproposal now filed would be considered untimely pursuant to Commission rules unaffected by the court's decision. Similarly, since the filing windows for all of the Docket 84-231 allotments have opened and closed, any proposal now filed would be unaffected by the no substitutions policy. While the post-window substitutions policy would continue to apply to circumstances in which a permittee has not been chosen for a Docket 84-231 allotment, we will not seek to reinstitute this policy. Institution of a proceeding to consider adoption of this policy would cause significant

delays in approving permittees for these allotments, a result which would be contrary to our interest in the efficient and expeditious implementation of new service. Instead, consistent with the procedure normally utilized in allotment proceedings, we will not dismiss a petition for a channel substitution solely to protect preferred transmitter sites of applicants for Docket 84–231 channels.

4. However, we recognize that we must reconsider earlier actions in which those policies were applied in a manner that prejudiced some party and in which that action remains subject to review. In order that our remedial actions proceed in an orderly fashion, we intend to apply the procedural rules normally applied in case-by-case allotment proceedings. We will consider timely counterproposals returned pursuant to the counterproposal limitations if that action remains subject to review. Because the initial comment period for Docket 84–231 allotments has closed, any conflicting proposal filed after the initial comment date in Docket 84–231 will not be considered as a counterproposal to the proposals initially advanced in this proceeding. Proposals submitted after the initial comment date and rejected under the no substitutions policy will be considered petitions for rule making if that action remains subject to review. Where appropriate, we will consolidate these proposals with other mutually exclusive petitions for rule making received after the initial comment date in this proceeding, and will seek comment on which of the proposals is substantively preferable. However, we will not accept counterproposals mutually exclusive with proposals already subjected to notice and comment, or treated as counterproposals in another proceeding. To treat these counterproposals in any other manner would obviate their cutoff protection, thereby removing a crucial source of certainty and finality in the allotment process. We will treat petitions rejected under the post-window substitutions policy as petitions for rule making if the rejection remains subject to review. Generally, we will reinstate those petitions, and, where appropriate, seek additional comments on the substantive question of whether the proposal should be preferred over any mutually exclusive proposal.

5. Since they pursued appeals and thereby prevented final disposition, we will conduct additional proceedings where necessary for the proposals advanced by James Reeder ("Reeder"), LM Communications ("LM"), and Marine Broadcasting Corporation ("Marine"). Reeder advanced a timely counterproposal in Docket 84–231, but it was rejected pursuant to the counterproposal limitations. Reeder also advanced a number of rule making proposals distinct from its counterproposal that involved communities not a part of its counterproposal. We will consider Reeder's counterproposal and its separate and subsequent rule making proposals by means of a separate *Further Notice of Proposed Rule Making* in this docket. This action will require reconsideration of our actions in MM Docket No. 87–242 (allotment to Bastrop, Louisiana), MM Docket No. 87–73 (RM–5381, allotment to El Dorado, Arkansas), and MM Docket No. 86–87 (allotment to Atlanta, Texas). In each instance, the finality of the proceedings was made contingent on the outcome of *Reeder*. We hereby vacate our actions in these proceedings with respect to the named communities. Petitions for reconsideration of MM Docket Nos. 87–242, 87–73, and 86–87 are hereby consolidated to the extent that they advocate allotments mutually exclusive with Reeder's proposals, with our consideration of Reeder's counterproposal in this docket.

6. LM's original request in this proceeding was filed as a petition for reconsideration, and alternatively captioned as a petition for new rule making. As a part of its request, LM sought substitution of a new channel for a channel allotted in Docket 84–231. Because LM's petition was returned pursuant to the no substitutions policy, we will treat LM's proposal as a petition for rule making. We note that LM's petition, and proposals in conflict with LM's petition, have been examined in MM Docket 88–31. Because final action has not been taken in Docket 88–31, and proposals in conflict with LM's proposal have been advanced in that docket, we will examine LM's petition in Docket 88–31. Because these proposals have already been subject to notice and comment, we will not accept as counterproposals any other petitions for rule making filed after the initial comment date in Docket 88–31.

7. Marine filed a petition for rule making requesting a channel upgrade that required the substitution of channels for two allotments made in Docket 84–231. The petition was returned as not acceptable for rule making pursuant to the no substitutions policy. We will consider Marine's proposal as a petition for rule making. However, while Marine's appeal was pending, several parties filed petitions for rule making mutually exclusive with Marine's proposal. In MM Docket 86–65, we allotted a mutually exclusive channel to Havelock, North Carolina. The allotment was conditioned upon the outcome of the *Reeder* decision. In light of the court's decision, we hereby vacate the allotment made in Docket 86–65. We also proposed a channel substitution at Hertford, North Carolina, in MM Docket 88–194. That substitution is contingent on approval of the proposal in Docket 86–65. Both of these proposals must be consolidated for consideration with Marine's petition. In addition, by *Notices of Proposed Rule Making* in MM Dockets 89–326 and 89–327, the staff, acting on delegated authority, proposed changes in the FM Table of Allotments for the state of North Carolina. While these proposed changes were not mutually exclusive with the Marine, Hertford, or Havelock proposals. Counterproposals filed in the proceedings have created a daisy chain of mutually exclusive proposals, and the Hertford, Havelock, and Marine proposals are links in that chain. Accordingly, we direct the staff to consolidate the proposals in MM Dockets 89–326 and 89–327, and consider the Marine, Hertford, and Havelock proposals in those proceedings. The staff will issue a public notice establishing a fifteen day period in which parties may file pleadings addressing the counterproposals. The staff is directed to liberally accept pleadings responsive to the pleadings filed during the initial fifteen day period if those responsive pleadings are filed within 30 days after the date of the staff's public notice.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

8. The authority citation for part 73 continues to read:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

9. Section 73.202(b), the Table of FM Allotments, is amended under Arkansas for El Dorado by removing Channel 241C2 and adding Channel 240A, under Louisiana for Bastrop by removing Channel 230C2 and adding Channel 232A, under North Carolina for Havelock by removing Channel 286C2 and adding Channel 285A, and under Texas for Atlanta by removing Channel 259C2 and adding Channel 257A.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 90-4273 Filed 2-23-90; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 84-231; FCC 90-49]

Radio Broadcasting Services; Increasing the Availability of FM Broadcast Allotments (Semora, NC and South Boston, VA)

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document responds to that portion of the decision of the United States Court of Appeals in *Reeder v. FCC*, 865 F.2d 1298 (D.C. Cir. 1989), in which the court vacated and remanded for further proceedings the allotment of Channel 294A to Semora, North Carolina, in the *Memorandum Opinion and Order* (MM Docket No. 84-231), 50 Fed. Reg. 4739 (1985), *aff'd, Memorandum Opinion and Order* (MM Docket No. 84-231), 51 FR 36401 (1986). This document affirms the Commission's determination that Semora is a community for allotment purposes. In addition, Channel 237A is allotted to South Boston, Virginia, as that community's second local FM service. Reference coordinates for Channel 237A are 36-42-00 and 78-54-12.

DATES: Effective April 9, 1990; The open window filing period April 10, 1990 and close on May 10, 1990.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Michael Ruger, Mass Media Bureau, (202) 632-6302.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Memorandum Opinion and Order in MM Docket 84-231, adopted February 1, 1990, and released February 20, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 657-3800, 2100 M Street, NW, Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments, is amended under Virginia for South Boston by adding Channel 237A.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 90-4275 Filed 2-23-90; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 88-31; RM-5682, 5848, 5979, 6166, 6384, 6385; FCC 90-51]

Radio Broadcasting Services; Moscow, Ohio; Paris, Wilmore, Morehead, Falmouth, Winchester, Carrollton, Elizabethtown, Dry Ridge, Somerset, and Williamstown, Kentucky

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a petition for reconsideration filed by L.M. Communications, Inc., of the *Report and Order* (MM Docket No. 88-31), 54 FR 3781 (1989). Channel 245C2 is substituted for Channel 244A at Paris, Kentucky, and the license of Station WCOZ-FM is modified accordingly, as requested by L.M. Communications. In addition, Channel 290A is substituted for Channel 242A at Wilmore, Kentucky, a site restriction is imposed on Channel 246C2 at Somerset, Kentucky, and vacant Channel 245A is deleted at Dry Ridge, Kentucky. Applicants for Channel 242A at Wilmore are ordered to amend their applications to specify the new channel and to specify new transmitter sites, if necessary. Seven applicants for Channel 246C2 at Goodlettsville, Tennessee, are ordered to amend their applications to meet spacing requirements to Channel 246C2 at Somerset. Coordinates for Channel 245C2 at Paris are 38-07-37 and 84-21-09. Coordinates for Channel 290A at Wilmore are 37-48-10 and 84-40-43, with a site restriction of 6.9 kilometers (4.3 miles) south to avoid a short-spacing to Station WCGW-FM, Channel 292A, Versailles, Kentucky. Coordinates for Channel 246C2 at Somerset are 36-58-00 and 84-34-00. With this action, the proceeding is terminated.

EFFECTIVE DATE: April 9, 1990.

ADDRESSES: FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, DC 20554.

FOR FURTHER INFORMATION CONTACT: Michael Ruger, Mass Media Bureau, (202) 632-6302.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Memorandum Opinion and Order, MM Docket No. 88-31, adopted February 1, 1990, and released February 20, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW, Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments, is amended for Kentucky as follows: under Paris, remove Channel 244A and add Channel 245C2; under Wilmore, remove Channel 242A and add Channel 290A; and under Dry Ridge, remove Channel 245A.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 90-4274 Filed 2-23-90; 8:45 am]

BILLING CODE 6712-01-M

Proposed Rules

Federal Register
Vol. 55, No. 38
Monday, February 26, 1990

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 831

Retirement; Law Enforcement Officers and Firefighters

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) proposes to revise regulations governing the special retirement provisions for law enforcement officers and firefighters employed under the Civil Service Retirement System (CSRS). The revision would clarify the definition of qualifying duties, bringing the regulatory definition into conformance with a parallel definition in Federal Employees Retirement System (FERS) regulations.

DATES: Comments must be received on or before April 27, 1990.

ADDRESSES: Send comments to Reginald M. Jones, Jr., Assistant Director for Retirement and Insurance Policy; Retirement and Insurance Groups; Office of Personnel Management; P.O. Box 57; Washington, DC 20044; or deliver to OPM, Room 4351, 1900 E Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Roderick T. Meader, (202) 632–5582, extension 207.

SUPPLEMENTARY INFORMATION: Section 8336(c) of title 5, United States Code, authorizes special retirement benefits for Federal law enforcement officers and firefighters. For a CSRS employee's service to qualify as law enforcement officer or firefighter service, his or her "primary duties" must be certain duties specified in law and regulation. The "primary duties" standard is also applied to FERS law enforcement officers and firefighters.

The term "primary duties" is defined in the relevant sections of the CSRS and FERS regulations (see 5 CFR 831.902 and 842.802). The regulatory definitions are identical except that the FERS definition adds a sentence stating that duties which an employee spends, on average, 50 percent of his or her time performing are generally considered his or her primary duties. In other words, duties which occupy 50 percent of an employee's time are generally deemed to be his or her primary duties without the need for further evidence or support.

The difference in the CSRS and FERS regulatory definitions of "primary duties" has apparently led some to believe that OPM interprets the term differently under the two retirement systems. In reality, OPM applies the same interpretation under both systems. The 50-percent-of-time general rule is applied under CSRS, as well as under FERS. In fact, the 50-percent-of-time rule has been used under CSRS for many years.

To prevent any confusion, we are proposing to amend the CSRS regulatory definition of "primary duties" to bring it into conformity with OPM's longstanding policy and practice and with its FERS regulatory counterpart.

E.O. 12291, Federal Regulations

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulations.

Regulatory Flexibility Act

I certify that within the scope of the Regulatory Flexibility Act, these regulations will not have a significant economic impact on a substantial number of small entities because they affect Federal employees and retirees only.

List of Subjects in 5 CFR Part 831

Administrative practice and procedure, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Retirement.

U.S. Office of Personnel Management.

Constance Berry Newman,

Director.

Accordingly, OPM proposes to amend 5 CFR part 831, as follows:

PART 831—RETIREMENT

Subpart I—Law Enforcement Officers and Firefighters

1. The authority citation for subpart I continues to read as follows:

Authority: 5 U.S.C. 8347.

2. In § 831.902, the definition of "primary duties" is amended by revising the introductory text and paragraph (c) to read as follows:

§ 831.902 Definitions.

* * * * *

"Primary duties" means those duties of a position that—

* * * * *

(c) Are assigned on a regular and recurring basis. Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50 percent of his or her time performing a duty or group of duties, they are his or her primary duties.

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[FR Doc. 90–4310 Filed 2–23–90; 8:45 am]

BILLING CODE 6325–01–M

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 206

Revision of Coal Product Valuation Regulation; Correction

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of proposed rule; correction.

SUMMARY: The Minerals Management Service (MMS) is correcting errors in the text which appeared in the **Federal Register** on February 13, 1990 (55 FR 5024).

FOR FURTHER INFORMATION CONTACT: Mr. Dennis C. Whitcomb at (303) 231–3432.

SUPPLEMENTARY INFORMATION: The MMS has published proposed regulations regarding a revision to coal product valuation which were promulgated on February 13, 1990 (55 FR 5024). The proposed regulations contain

errors which are briefly discussed below and are corrected by this Notice.

* * * * *

Dated: February 16, 1990.

Jerry D. Hill,

Associate Director for Royalty Management.

The following corrections are made in FR Doc. 90–3310, Revision of Coal Production Valuation Regulations published in the **Federal Register** on February 13, 1990 (55 FR 5024).

1. On page 5029, first column, line 11, change "§ 206.25" to "§ 206.251".

2. On page 5029, first column, line 12, change "subpart E" to "subpart F".

3. On page 5029, first column, line 16, change "subpart E" to "subpart F."

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[FR Doc. 90–4295 Filed 2–23–90; 8:45 am]

BILLING CODE 4310–MR–M

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

Pennsylvania Regulatory Program; Regulatory Reform

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule.

SUMMARY: OSM is announcing receipt and requesting comments on a proposed amendment to the Pennsylvania permanent regulatory program (hereinafter referred to as the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment covers a wide variety of topics and is primarily in response to changes in Federal regulations (30 CFR Chapter VII) occurring between July 31, 1982 and October 1, 1983. Provisions are included to address a July 9, 1986, 30 CFR 732.17(e)(3) letter from OSM to the Pennsylvania Department of Environmental Resources (the Department) concerning off-site disturbance involving the construction of roads between permitted areas to move mining equipment. Provisions are also included to address requirements concerning prime farmlands in the anthracite coal fields. In addition, other changes are proposed by the Department.

This notice sets forth the times and locations that the Pennsylvania program and the proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the amendment and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received on or before 4 p.m. on March 28, 1990, to ensure consideration in the rulemaking process. If requested, a public hearing on the amendment will be held at 9 a.m. on March 23, 1990. Requests to present testimony at the hearing must be received on or before 4 p.m. on March 13, 1990.

ADDRESSES: Written comments and requests to testify at the hearing should be mailed or hand delivered to Robert J. Biggi, Director, Harrisburg Field Office at the address listed below. Copies of the Pennsylvania program, the proposed amendment, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays.

Each requestor may receive, free of charge, one copy of the proposed amendment by contacting OSM's Harrisburg Field Office.

Office of Surface Mining Reclamation and Enforcement, Harrisburg Field Office, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone: (717) 782–4036.

Pennsylvania Department of Environmental Resources, Office of Environmental Energy Management, 10th Floor, Fulton Building, 3rd and Locust Streets, P.O. Box 2063, Harrisburg, Pennsylvania 17120, Telephone: (717) 787–4686.

A public hearing, if held, will be at the Penn Harris Motor Inn and Convention Center at the Camp Hill Bypass and U.S. Routes 11 and 15, Camp Hill, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: Robert J. Baggi, Director, Harrisburg Field Office, (717) 782–4036.

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program

The Secretary of the Interior conditionally approved the Pennsylvania program on July 31, 1982. Information on the background of the Pennsylvania program including the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Pennsylvania program can be found in the July 30, 1982 **Federal Register** (47 FR 33050). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 938.11, 926.12, 938.15 and 938.16

II. Discussion of Amendment

Since July 31, 1982 (the date of conditional approval of the Pennsylvania program), a number of changes have been made to Federal regulations concerning surface coal mining and reclamation operations. Pursuant to the Federal regulations at 30 CFR 732.17, OSM informed Pennsylvania on August 14, 1986, (Administrative Record Number PA 610) that a number of Pennsylvania regulations are less effective than or inconsistent with the revised Federal requirements.

During routine oversight activities OSM identified a condition where a road, constructed to move equipment between two permitted areas, was not permitted. After discussion with the State, OSM determined that the approved program no longer met the requirements of SMCRA and the Federal regulations. On July 9, 1986, OSM issued a 30 CFR 732.17(e)(13) letter (Administrative Record Number PA 646) requiring a proposed written amendment or description of an amendment to address the identified program deficiencies. Additionally, final Federal rules (51 FR 18314, May 19, 1986) require Pennsylvania to amend certain anthracite prime farmland rules, Chapter 88.

By letter dated December 22, 1989, (Administrative Record Number PA 790.00) Pennsylvania submitted to OSM a State program amendment package consisting of 109 revisions as proposed in Volume 18, *Pennsylvania Bulletin*, 3621, August 13, 1988 and 40 modifications based on public comments and internal review of the 109 revisions. The program amendment addresses Regulatory Reform Review I, unpermitted roads used to move equipment, and prime farmlands in the anthracite coal fields. In addition, the amendment includes rules to implement amendments to the Surface Mining Conservation and Reclamation Act as found in Act 181 (1984), Act 171 (1986), and Senate Resolution 100. Rules based on recommendations from the Coal Work Group (CWG) are also included. The CWG is a group of legislators and industry representatives established by the Department to recommend ways to streamline the Department's coal regulatory program.

A summary of the Pennsylvania amendment provisions including 109 revisions and 40 modifications to the revisions is listed below.

Revisions

1. Section 86.1 Definitions

The definition of "surface mining activities" is clarified to include "substantial disturbance" resulting from the movement of surface mining equipment to a new permit area.

2. Section 86.3 Use of Coal Refuse Disposal Control Fund

This section is proposed to be added to provide that monies deposited in the Coal Refuse Disposal Control Fund are used for reclamation, abatement of safety hazards and other related uses.

3. Section 86.11 General Requirements for Permits

This proposed amendment requires an authorization to mine, in addition to a valid permit, before the permittee can carry out any coal mining activites.

4. Section 86.17 Permit and Reclamation Fees

This proposed amendment clarifies the language of § 86.17(b) pertaining to reclamation fees. Also, permit renewal fees are eliminated if an operator is engaged in reclamation activities at the time his renewal application is submitted.

5. Section 86.31 Public Notice of Filing of Permit Applications

This proposed amendment requires the applicant to state the purpose of his application in the public notice.

6. Section 86.32 Opportunity for Submission of Written Comments or Objections on the Permit Application.

Under Act 1894–181, the public comment period terminates 30 days after the last date of publication of the newspaper advertisement. The Department, however, will continue to place these notices in the Pennsylvania Bulletin.

7. Section 86.34 Informal Conferences

Under Act 1984–181, the Department will hold informal conferences within 60 days after the last date of publication of the newspaper advertisement. The proposed amendment also requires the Department to take an action or request additional information on the application within 60 days after holding the informal conference.

8. Section 86.37 Criteria for Permit Approval or Denial

This OSM prompted amendment provides that coal mining permits may not be issued if an applicant has unpaid State or Federal civil penalties.

9. Section 86.39 Final Permit Action

Under Act 1984–181, this proposed amendment specifies certain time limitations for final permit actions by the Department. Also, the amendment is proposed to limit the distribution of final copies of issued permits to OSM to those permits specifically requested by OSM. This second change is a Department change.

10. Section 86.52 Permit Revisions

This proposed amendment clarifies when permit revisions are to be obtained.

11. Section 86.54 Public Notice of Permit Revision

This proposed amendment requires public notice of permit revision for nonconventional Best Available Technology (BAT) treatment, addition of fly ash disposal, physical changes to the mine configuration and addition of blasting to existing permits.

For underground permits, because of the minor environmental impact of boreholes, the notice requirement for boreholes has been deleted.

Physical changes in the underground mine configuration, including stream diversions, new or expanded roads, elimination of public roads, and changes in postmining land use, would now require public notice.

For coal refuse disposal activities the proposed changes are the same as for underground mining activities.

12. Section 86.64 Right of Entry

The right of entry requirements are proposed to be changed to reflect the current legislation of Act 1984–181 and Act 1986–171.

13. Section 86.70 Proof of Publication

This proposed amendment allows applicants to provide the Department with a newspaper advertisement within 4 weeks after the last date of advertisement. This change is necessary since many newspapers would not provide the applicant with notarized intents to publish in advance of the actual dates of publication.

14. Section 86.83 Eligibility for Assistance

This OSM-mandated amendment is proposed to limit the eligibility of applicant assistance under the Small Operator Assistance Program.

15. Section 86.92 Basic Qualifications

This OSM-mandated amendment is proposed to specify the methodologies to be used by qualified Small Operator Assistance laboratories.

16. Section 86.94 Applicant Liability

This proposed amendment establishes conditions and circumstances whereby permit applicants must reimburse the Department for monies that were received through the Small Operator Assistance Program.

17. Sections 86.102, 86.103, 86.121 and 86.124(a)(6) Areas Where Mining is Prohibited or Limited

Since the areas unsuitable for mining program pertains directly to surface mining activities, these proposed amendments would amend the existing language from "operations" to "activities".

18. Section 86.123 Procedures: Petitions

This proposed amendment, prompted by the CWG, tracks SMCRA by providing that any person having an interest which is, or may be, adversely affected has the right to petition.

An additional proposed amendment prompted by the CWG requires that contemporary mining practices be considered if the site is to be mined.

19. Section 86.124(a)(1) Procedures: Initial Processing, Recordkeeping and Notification Requirements

This proposed amendment clarifies that the designation of areas unsuitable for mining applies only to surface coal mining activities.

20. Section 86.134 Coal Exploration Performance and Design Standards

An administrative amendment is proposed to reference chapter 89, subchapter B.

21. Section 86.143 Requirement To File a Bond

This proposal amends the regulations at § 86.143 (a) and (b) to eliminate the concept of phased operations.

The proposed amendment to § 86.143(c) clearly states that all bonds apply to the entire permit area, regardless of when they are approved for the permitted operation.

22. Section 86.145 Department Responsibilities

This proposed amendment eliminates the need for annual review of bonding rates provided that the rates are established under the requirements of § 86.149(b).

23. Section 86.149 Determination of Bond Amount

This amendment requires the Department to use this section in determining bond amount if the

Department has not established guidelines under § 86.145(c).

24. Section 86.150 Minimum Amount

This proposed amendment clarifies the minimum $10,000 bonding rate for anthracite coal refuse disposal as required in the Coal Refuse Disposal Act. All other bonding rates for anthracite will remain at a minimum of $5,000 per site.

25. Section 86.152 Adjustments

This proposed amendment to § 86.152 (b) and (c), prompted in part by the CWG allows for bond adjustment without public notice for: (1) areas on the permit where no disturbance has occurred and no reclamation liability has been incurred; and (2) revisions of the cost estimate of reclamation. A person cannot obtain release or adjustment of bond if there is a discharge on, or connected to, any portion of the permit area.

26. Section 86.156 Form of the Bond

This proposed amendment provides for changing the bond forms to require banks or other lending institutions, surety companies and permittees to notify the Department of actions relating to insolvency or bankruptcy.

27. Section 86.157 Special Terms and Conditions for Surety Bonds

This proposed amendment specifies agents or institutions that can underwrite surety bonds within this Commonwealth. Also, it requires that the bond not be impaired or affected by renewal or time extension for performance or other delay in forfeiting the bond.

28. Section 86.158 Special Terms and Conditions for Collateral Bonds

This proposed amendment deletes the present language at § 86.158(b) and adds detailed information for valuing collateral bonds.

Subsection (d) is proposed to be amended to permit lending institutions within the United States to write letters of credit, provided they accept jurisdiction in this Commonwealth. Also, it specifies the conditions for acceptance of a letter of credit as collateral bond.

29. Section 86.160 Surety/Collateral Combination Bond

This proposed amendment allows acceptance of surety/collateral combination bonds in any combination provided the bond amount is adequate to insure reclamation.

30. Section 86.161 Phased Deposits of Collateral

This proposed amendment eliminates deposit of bond for designated phases of the permit area and specifies requirements for phase deposit of collateral.

31. Section 86.165 Failure to Maintain Proper Bond

This proposed amendment clarifies the requirement of maintaining adequate bond and the consequences of failing to do so.

32. Section 86.166 Replacement of Bonds

This proposed amendment requires that a permittee who desires to replace surety or collateral bonds with other surety or collateral bonds, must have replacement bonds of equivalent value. It also requires that a permittee who replaces existing surety or collateral bonds with phased deposit of collateral must provide the initial payment in an amount equal to the replaced bonds.

33. Section 86.168 Terms and Conditions for Liability Insurance

This Act 1984–181 proposed amendment provides that a bond or individual insurance policy may be provided for each permit to cover replacement or restoration of water supplies.

34. Section 86.171 Procedures for Seeking Release of Bond

This proposed Act 1984–181 amendment specifies that failure to provide proof of publication for bond release within 60 days of filing an application for release of bond will result in the application being returned to the applicant as incomplete.

The proposed amendment adds language specifying the decision making time allowed for the Department to review complete applications for bond release.

35. Section 86.172 Criteria for Release of Bond

This proposed amendment clarifies conditions for bond release and adjustment. Also, it specifies postmining obligations for the permit area.

36. Section 86.173 Bond Release for Noncoal Mining Activities

This proposed amendment deletes a reference to noncoal mining activities.

37. Section 86.174 Standards for Release of Bonds

This proposed amendment clarifies the minimum performance standards necessary for bond release.

38. Section 86.175 Schedule for Release of Bond

This proposed section clarifies the schedule for bond release and the amount of release available as reclamation standards are achieved.

39. Section 86.182 Procedures

This recommended amendment authorizes the Department to proceed with collection of a forfeited bond if an appeal is filed and the appeal is unsuccessful.

An amendment for clarity is also proposed which directs the Department to deposit bond forfeitures in the SMCRA Fund.

In addition, if the issuing authority refuses to honor its collateral obligations, the Department will take all appropriate steps to collect the proceeds.

40. Sections 86.192 and 86.193 How Assessments Are Made When a Penalty Will Be Assessed

These proposed OSM-mandated amendments require, if appropriate, that civil penalties be assessed against individual corporate officers.

41. Section 86.211 Enforcement—General

This proposed amendment is the result of recommendation from the CWG which would allow extensions for abatement beyond 90 days for valid judicial orders and labor strikes.

42. Sections 87.1, 88.1 and 90.1 Definitions

This OSM-mandated proposed amendment broadens the definition of "coal processing waste" to include any earth materials separated or wasted during processing or coal preparation.

43. Sections 87.1, 88.1, 88.482 and 90.1 Definitions

The proposed definition of "dry weather flow" defines the conditions under which 24-hour discharges from sediment ponds can meet a settleable solids limitation rather than a suspended solids effluent limitation.

44. Sections 87.1, 88.1 and 90.1 Definitions

The proposed amendment to the definition of "recreation" limits postmining recreational uses to developed uses.

45. Sections 87.1 and 90.1 Definitions

The proposed amendment to the definition of "noxious plants" limits determination of noxious plants to

Pennsylvania's official list of noxious plants.

46. Section 87.17 Criteria for Approval of Applications

This proposed Act 1984–181—mandated amendment limits circumstances under which the Department could not issue, renew or amend a surface mining license. It also specifies the burden of proof for those opposing license decisions and defines "adjudicated proceeding."

47. Section 87.18 License Renewal Requirements

This proposed Act 1984–181—mandated amendment specifies a minimum 60-day period for renewing a license prior to expiration.

48. Sections 87.46, 88.492, 89.34 and 90.14 Surface Water Information

These proposed amendments allow applicants to provide either total dissolved solids concentrations or specific conductance values to meet the water monitoring requirements of the permit application.

49. Sections 87.53, 88.32, 89.122 and 90.22 Prime Farmland Investigation

These OSM-mandated amendments propose, if prime farmlands are present, that the soil description must be based on current United States Soil Conservation Service publications or other publications approved by the State Conservationist, United States Conservation Service.

Chapter 88 is also proposed to be amended per OSM mandate to eliminate the prime farmlands exemption for small plots (less than 5 acres).

50. Sections 87.54, 88.31, 88.491 and 90.21 Maps, Cross Sections and Related Information

The proposed amendment to § 87.54 corrects the error of having "each soil survey" to the proper language "each permit application."

The proposed amendments to §§ 87.54, 88.31 and 88.491, under Act 1984–181 allow registered land surveyors to prepare maps, plans and the like.

This OSM-mandated amendment adds the word "qualified" before registered professional engineer, land surveyor and geologist.

51. Section 87.62 Operational Information

This proposed amendment deletes "narrative" and substitutes "explanation." This is needed to overcome an OSM permitting oversight misunderstanding.

A requirement is also added whereby the relative sequence and timing of an operation and its estimated life are now informational requirements.

52. Section 87.64 Blasting Plan

This OSM-mandated amendment is proposed to require that a blast plan be prepared and signed by a certified blaster.

53. Sections 87.65, 88.31, 88.44, 88.492 and 90.46 Maps and Plans

These proposed OSM administrative amendments require that qualified professionals prepare maps, plans and the like.

Registered professional land surveyors are authorized, under Act 1984–181, to prepare the same maps and plans, except those identified in § 90.46.

54. Section 87.68 Reclamation Information

A minor technical amendment is proposed whereby "techniques" would replace "measures" for determining revegetative success. This amendment is needed to overcome an OSM permit oversight misunderstanding.

55. Sections 87.73, 89.101 and 90.112 Dams, Ponds, Embankments and Impoundments

Under the statutory changes of Act 1984–181 these sections are proposed to be amended to allow qualified registered professional land surveyors to prepare design plans for certain size impoundments.

Under OSM mandate, these sections are proposed to be amended to require that impoundments are certified annually until removal of the structure or release of the performance bonds. They also require the person who examined or inspected the impoundment to promptly inform the Department if a potential hazard exists.

56. Sections 87.83, 89.11 and 90.45 Prime Farmlands

These OSM-mandated amendments specify the elements of a soil survey.

57. Sections 86.1 and 87.1 Definitions

This OSM-mandated amendment is proposed to require that pathways for equipment movement are surface mining activities which must comply with Chapters 86 and 87 when substantial disturbance of the surface occurs.

58. Section 87.99 Topsoil Redistribution

This proposed amendment corrects a typographical error to require land to be scarified.

59. Section 87.101 Hydrologic Balance: General Requirements

This proposed amendment tracks the language of SMCRA which requires the prevention and treatment of pit water accumulations and prohibits gravity discharges of water from the pit.

60. Sections 87.102, 88.92, 88.187, 88.292, 89.52 and 90.102 Hydrologic Balance: Effluent Standards

The Department proposes to amend the effluent standards to allow some relief to the total suspended solids limitations during rainfall events.

The Department also proposes to adopt the alkaline manganese exemption as allowed by the United States Environmental Protection Agency (EPA), BAT standards for coal mining activities.

While an exemption for alkaline manganese discharges is proposed, the operator must still comply with the Department's water quality standards.

61. Sections 87.103, 88.93, 88.188, 88.293, 89.53 and 90.103 Catastrophic Storm Exemption

These proposed amendments require the operator to demonstrate to the Department's satisfaction that dry weather flow conditions did not exist in order to use a precipitation event to obtain an exemption to the total suspended solids requirements of §§ 87.102, 88.92, 88.187, 88.292, 89.52 and 90.102.

Modifications in the rainfall event listing specify which rainfall events for given counties represent events in excess of the 10-year, 24-hour rainfall event. Other modifications were made for technical accuracy.

62. Sections 87.104, 89.59 and 90.105 Stream Diversions

These proposed amendments add a requirement that stream channel diversions must be designed and certified by a qualified registered professional engineer.

63. Sections 87.112, 89.101, 89.112 and 90.112 Dams, Ponds, Embankments and Impoundments—Design, Construction and Maintenance

The proposed amendments to these sections prompted by Act 1984–181 specify the design manuals to be employed for impoundment design and allow registered professional land surveyors to design the structures.

Further amendments, mandated by OSM, are proposed to require the structure to be inspected until removal or bond release, and specify procedures

to be followed in the event that potential hazards develop with the structure.

64. Sections 87.118 ands 90.117 Transfer of Wells

The Department proposes to delete these sections since there is no legal requirement for transfer of wells.

65. Section 87.124 Use of Explosives: General Requirements

This OSM-mandated amendment requires that persons responsible for blasting must be familiar with their blast plan and site-specific performance standards.

66. Sections 87.125 Use of Explosives: Preblasting Survey

This OSM-mandated amendment is proposed to require the operator to explain how to request a preblast survey and specify time limitations for notification and conductance of certain surveys.

67. Section 87.127 Survey Blasting Requirements

This OSM-mandated amendment are proposed to change requirements regarding authorization to blast, limitations on air blast to prevent damage, periodic monitoring of air blasts, alternative modified scaled-distance factors and maximum ground vibration.

68. Section 87.129 Records of Blasting Operations

This OSM-mandated amendment are proposed to require sketches of the blast pattern, number of holes, burden, spacing and decks. Further recordation requirements require listing of the type of instrument used to monitor air and ground vibrations, the sensitivity of the instrument and annual certification of calibration.

69. Sections 87.131 and 90.124 Disposal of Excess Spoil

These OSM-mandated amendments are proposed to require that excess spoil disposal fill and refuse disposal areas be inspected by a qualified registered professional engineer. Also, color photographs must be taken of the rock underdrains.

70. Sections 87.135 and 88.54 Protection of Underground Mining

These proposed amendments limit mining activities within 500 feet of an active deep mine unless jointly approved by the Department and the Mine Safety and Health Administration, or within 500 feet of an abandoned deep mine, if approved solely by the Department.

71. Sections 87.138, 89.82 and 90.150 Protection of Fish, Wildlife and Related Environmental Values

These OSM-mandated amendments are proposed to assure greater protection of bald and golden eagles.

72. Section 87.141 Backfilling and Grading: General Requirements

The Department clarifies concurrent backfilling requirements in response to the CWG Report by providing that the Department may approve alternate time and pit width requirements in the operation and reclamation plan. Also, the Department proposes to amend the reference to exemptions to approximate original contour (AOC) requirements.

An alternative § 87.141 has been proposed by the Department in response to the CWG Report. This alternative is available from the Department upon request.

73. Section 87.142 Backfilling and Grading: Reaffecting Previously Mined Lands

This OSM-mandated amendment is proposed to limit the alternatives to approximate original contour requirements to terracing on previously mined areas.

74. Section 87.143 Backfilling and Grading: Alternatives to Contouring and Terracing

This OSM-mandated amendment is proposed to delete the Department's authority to approve alternative backfilling on previously unaffected land.

75. Sections 87.146 and 89.87 Regrading or Stabilizing Rills and Gullies

In response to the CWG Report, the Department proposed to amend the repair of rills and gullies requirement so that repair is able to be delayed to the next favorable planting season if sediment and erosion control facilities are in place.

76. Section 87.148 Revegetation Timing

In response to the CWG Report, the Department proposes to amend the timing requirements for revegetation to the next full planting season and allows for extension of revegetation where weather conditions are not favorable for planting.

77. Section 87.157 Cessation of Operations: Temporary

In response to the CWG Report, the Department recommends an amendment to allow for a single temporary cessation up to 180 days.

78. Section 87.176 Auger Mining

This OSM-mandated proposed amendment specifies that auger holes must be plugged within 72 hours after augering if the holes are discharging acid or toxic materials. In addition, certain spacing requirements have been deleted by the Department in response to the CWG Report.

79. Sections 87.207 and 88.507 Treatment of Discharges

In response to the CWG Report, the Department recommends allowing the operator to comply with the effluent limitations at §§ 87.102 and 88.92 for parameters which, at the baseline pollution load, are less than the effluent limitations at §§ 87.102 and 88.92.

80. Section 88.1 Definitions

The Department proposes to correct the definition of "disturbed area" to reference the bonding and insurance requirements.

81. Section 88.24 Geology

To address concerns of OSM, the Department clarifies its existing authority under subsection (b)(4) by proposing to require analysis of both coal and overburden when deemed appropriate by the Department.

82. Section 88.61 Prime Farmlands

This OSM-mandated amendment proposes to change requirements for identification, reconstruction and reestablishment of the premining productivity of prime farmlands in the premining plan.

83. Sections 88.102, 88.197 and 88.302 Hydrologic Balance: Dams, Ponds, Embankments and Impoundments—Design, Construction and Maintenance

These OSM-mandated amendments are proposed to clarify requirements that all ponds meet the design criteria of 350 Sediment Basin and '378 Pond.' These manuals are now routinely used for pond design but their direct reference was not previously required.

84. Sections 88.103, 88.198 and 88.303 Hydrologic Balance: Coal Processing Waste Dams and Embankments

These proposed technical amendments clarify requirements that both Chapter 105 and "Pond 378" requirements be met, as applicable.

85. Section 88.494 Performance Standards—in Situ Processing of Anthracite Coal

This Act 1984–181 mandated amendment is proposed to prohibit the

issuance of permits for underground burning of anthracite coal.

An additional administrative amendment is proposed which changes "experimental" to "innovative" operations. This amendment is recommended to avoid confusion with the OSM experimental practices regulations.

86. Section 89.2 Scope

This proposed amendment deletes reference to "storage, loading and handling facilities" since these activities are included in the definition of coal preparation activities and underground mining activities.

87. Section 89.7 Applicability

The term "coal preparation activities" is proposed to be added to this section to clarify the current applicability of chapter 89.

88. Section 89.26(e)(2) Roads

This proposed amendment, which deletes the requirements that roads be certified as meeting safety and performance standards, makes chapter 89 consistent with chapters 87, 88 and 90.

89. Section 89.32 General Description of Underground Mining Activities

The additional requirement of naming the coal seams to be mined in the general description of the proposed underground mine corrects what the Pennsylvania Department of Environmental Resources (DER) perceives as an informational deficiency in underground permit applications.

90. Section 89.33 Geology

This OSM-mandated amendment is proposed to allow a waiver of overburden analyses only if other information having equal value or effect is available to the Department in a satisfactory form.

91. Section 89.34 Hydrology

This OSM-mandated proposed amendment relates the hydrologic information requirement in a permit application to the hydrologic monitoring plan.

92. Section 89.59 Surface and Groundwater Monitoring

This OSM-mandated amendment is proposed to clarify the requirements for hydrologic monitoring plans and makes this section more consistent with the equivalent sections in chapters 87 and 90.

93. Sections 88.492 and 89.71 General Requirements

In order to make chapters 88 and 89 consistent with the requirements of chapters 87 and 90, the Department proposes deleting §§ 88.492(c)(1) (i) and (ii) and 89.71(a) (1) and (2). The application for a permit will now be required to contain a complete reclamation plan.

Sections 88.492(c)(4) and 89.71(d) are proposed to be deleted so that the information for postmining land use is consistent with the requirements in chapters 87 and 90.

94. Section 89.83 Closing of Underground Mine Openings

The Department proposes to add a new subsection which prevents the sealing of underground mines which receive a discharge from another coal mining activity until the other coal mining activity receives approval for alternate means of handling its discharge.

95. Section 89.84 Backfilling and Grading

The Department proposes language which refers to the backfilling and grading requirements of chapter 87 since these requirements are applicable to the surface areas affected by underground mining.

96. Section 89.86 Revegetation

The proposed amendment to subsection (a)(2) is mandated by OSM. This change requires the revegetative cover to be of the same seasonal character as the original vegetation.

97. Section 89.142 Maps

The mapping requirements of this section are revised under Act 1984–181 to allow preparation by a registered professional land surveyor.

These requirements are also revised under the OSM mandate requiring preparation by qualified persons.

In addition, the Department proposes to add a mapping requirement for areas over the proposed mine where overburden is 100 feet or less. This change directly relates to the permitee's ability to meet the performance standard in § 89.143(a) which prohibits mining beneath certain structures where the depth of overburden is less than 100 feet.

98. Section 89.143(a) Performance Standards

Subsection (a) is revised to correct an existing technical error in the requirements for determining a support area.

99. Section 89.144 Public Notice

The Department proposes to add language which requires an operator to provide notice by mail prior to mining beneath a property or within a political subdivision.

100. Sections 89.171–89.173 General Requirements: Information Requirements: Performance Standards

The Department proposes these sections to identify the informational requirements and performance standards which apply to coal preparation activities.

101. Section 90.1 Definitions

The Department proposed an amendment to the definition of "disturbed area." This revision is to correct a previous referencing error.

102. Section 90.4 General Requirements Applications

The Department proposes to delete this section.

103. Section 90.39 Ponds, Impoundments, Banks, Dams, Embankments, Piles and Fills

The Department proposes this amendment which specifies in more detail who may prepare the plans for impoundments and ponds.

104. Section 90.113 Hydrologic Balance Coal Processing Waste Dams and Embankments

The Department proposes an amendment to subsection (b) to correct grammatical errors.

105. Section 90.122 Coal Refuse Disposal

The proposed amendment to subsection (b) is the result of an OSM mandate that the regulation must specify that the registered professional engineer who designs the fill be qualified.

The Department proposes revising subsection (j) by removing the 100-foot elevation limit on refuse piles and by allowing, with Department approval, fills to exceed the approximate elevation of the surrounding ridgeline.

106. Section 90.125 Coal Refuse Disposal: Construction Requirements

The Department proposes a technical clarification to subsection (b)(2) which specifies the two standard testing procedures that can be used for compaction.

Under OSM mandate, subsection (b)(3) which allows for variation to the standards set in (b) (1) and (2) is proposed to be deleted.

The Department proposes requiring a maximum of 4 feet of cover, unless the permittee provides a demonstration that a lesser thickness is as effective, or the operation was both permitted prior to the effective date of this revision, and is capable of meeting revegetation standards.

107. Sections 90.128 and 90.129 Coal Refuse Disposal Active Surface Mines Abandoned Unreclaimed Surface Mines

The Department proposes rewriting these sections to eliminate redundance. The proposed amendment clarifies the placement of refuse with respect to the water table and pit floor.

108. Section 90.133 Disposal of Noncoal Wastes

The Department proposes requirements to prevent flammable waste materials from being placed on or near coal refuse disposal piles.

109. Protection of Fish, Wildlife and Related Environmental Values

In response to a proposal made by the Fish Commission at the April 19, 1988 meeting of the Environmental Quality Board (EQB), the Department has agreed to consider the addition of various fish and wildlife informational requirements for the administration of the related performance requirements included in the proposal. The informational and performance requirements must be consistent with those set forth in the Federal regulations at 52 FR 47352 (December 11, 1987). All interested persons are encouraged to submit comments on said proposal during the public comment period.

Modifications

(1) Section 86.1 Definitions

Section 86.1 is changed from proposed rulemaking to delete a Legislative Reference Bureau change to the proposed text which would have altered the current term of art regulatory definition of "Waters of the Commonwealth" set out in Section 3 of the Clean Streams Law, 35 P.S. § 691.3.

(2) Section 86.11(a) General Requirements for Permits

Section 86.11 is also changed from proposed rulemaking to delete the Legislative Reference Bureau change to the proposed text, which would have altered the current term of art regulatory definition of "Waters of the Commonwealth" set out in section 3 of the Clean Streams Law, 35 P.S. section 691.3.

(3) Section 86.17(e) Permit and Reclamation Fees

Section 86.17 is changed to clarify that the $50 per acre reclamation fee does not apply to the surface effects of underground mining.

(4) Section 86.37 Criteria for Permit Approval or Denial

Section 86.37 is changed in response to a comment received by the EQB. The proposed rulemaking required a statement from the permit applicant that State and Federal civil penalty assessments have been paid before a permit or revised permit would be approved. The commenter indicated the proposed revision does not allow for issuance of permits while a penalty is being appealed. The regulation was changed to apply to final civil penalty assessments. For purposes of this subsection, final civil penalty assessments were defined to include assessments which had not been appealed within 30 days of assessment or assessments which have been adjudicated.

(5) Section 86.39(b)(1) Final Permit Action

Section 86.39 is changed from proposed rulemaking to clarify that the OSMRE is entitled to notice of DER coal mining permit decisions. Also, the section is changed to clarify that OSMRE is entitled to a copy of coal mining permits issued by the Department, upon request.

(6) Section 86.52 Permit Revisions

Section 86.52 is changed in response to comments received by the EQB. The proposed rulemaking required permit revisions for a change to the environmental resource information, operation plan, reclamation plan or subsidence control plan rather than for any change to coal mining activities as currently required. The commentors indicated the proposed change relating to when permit revisions would be required is too broad. The regulation was changed by removing the words "environmental resource information".

(7) Section 86.54 Public Notice to Permit Revision

Section 86.54 is changed by the Department to require public notice of permit revisions involving the proposed use of sewage sludge for land reclamation. This change was necessary as the recently adopted Municipal Waste Management Regulations (25 Pa. Code Chapter 217) required such public notice when sewage sludge is proposed for use in land reclamation.

(8) Section 86.57 Reservation of Rights

Section 86.57 is revised to delete the references to §§ 87.118 and 90.117. Sections 87.118 and 90.117 were proposed for deletion as set forth in 18 *Pa.B.* 3621 and this revision is required so that § 86.57 no longer refers to sections which will be deleted.

(9) Section 86.64(b) Right of Entry

Section 86.64 is changed from proposed rulemaking to clarify that right of entry requirements apply to all coal mining permit applications, not just surface mining permit applications.

(10) Section 86.64(c), (c)(1)(i) Right of Entry

Section 86.64 is changed to delete a Legislative Reference Bureau Change to the proposed text which would have deleted from the mining regulations an Act 181 requirement that right of entry forms be considered recordable documents.

(11) Section 86.64(c)(2) Right of Entry

Section 86.64 is changed to reflect an Act 171 requirement not contained in the proposed rulemaking package that permit applications for coal refuse dispoasl areas, coal preparation activities not situated on a surface mining permit area, and surface activities of underground mines, must submit a description of documents upon which the applicant bases his right to enter onto surface land and conduct mining activities.

(12) Section 86.101 Definitions

The term "surface mining" which is currently defined in § 86.101 is changed to "surface mining actitivies." This change is made in response to a comment received by the EQB and clarifies that the Department's change of "surface mining operation" to "surface mining activities" for the sake of consistency in §§ 86.101, 86.102, 86.103, 86.121 and 86.124 does not lessen the protection afforded in the broad definition of "surface mining" contained in § 86.101 (which includes surface impacts related to underground mining). The commentor feared that changing § 86.102 to refer to "surface mining *activities*" would allow the Department to apply the definition of "surface mining activities" in 86.1 (which does *not* include surface impacts related to underground mining) to § 86.102.

(13) Section 86.102 Areas Where Mining is Prohibited or Limited

Each reference to the term "surface mining" is changed to "surface mining *activities*" for the sake of consistency

and for the reasons mentioned under § 86.101 above.

(14) Section 86.103 Procedures

Each reference to the term "surface mining" is changed to "surface mining *activities*" for the sake of consistency and for the reasons mentioned under § 86.101 above.

(15) Section 86.124 Procedures: Initial Processing, Recordkeeping and Notification Requirements

Section 86.124 is changed in response to comments made by the independent Regulatory Review Commission (IRRC). The change involved removing the word "mineable". The proposed rulemaking required the Department to make a determination of whether identified mineable coal resources exist within an area petitioned for designation as unsuitable for mining. By removing the word "mineable", the Department would not be required to make a determination of the mineability of a coal resource when processing a petition.

(16) Section 86.127 Data Base and Inventory System Requirements

Section 86.127 is revised to correct an improperly cited section reference.

(17) Section 86.145 Department Responsibilities

Section 86.145 is changed in response to a comment indicating the Department has an obligation to annually review bonding rates in addition to it being important for public information. The change involves retaining the word "annually" which was proposed to be deleted. The change maintains the requirement for the Department to review bond rate guidelines annually.

(18) Section 86.149(a) Determination of Bond Amount

Section 86.149 is changed to clarify that the Department may establish bond rate guidelines which utilize the factors set forth in § 86.145(c) and § 86.149.

(19) Section 86.150 Minimum Amount (Bonding)

Section 86.150 is changed to clarify that the minimum amount of bond for bituminous and anthracite coal refuse disposal operations is $10,000.

(20) Section 86.152(c) Adjustments

Section 86.152 is clarified to provide that bond adjustments which involve unaffected portions of a permit area upon which no reclamation liability has been incurred are not subject to the procedures of Section 86.170—86.173, except as provided in § 86.172(b) and (c). This change is made to clarify that no bond shall be adjusted or released if reclamation liability (e.g., mine drainage which exceeds effluent limits is on or emanates from the unaffected area of a permit) is incurred.

(21) Section 86.158(b)(4) Special Terms and Conditions for Collateral Bonds

Section 86.158(b)(4) is changed to clarify that the Department will not make interest payments for past forfeiture interest accruing during appeals, and after resolution of the appeals, when the forfeiture is adjudicated or decided in favor of the Commonwealth. The concept of "settled" in favor of the Commonwealth is disbanded.

(22) Section 86.158(d) Special Terms and Conditions for Collateral Bonds

Section 86.158(d) is revised in order to correct a grammatical error.

(23) Section 86.211 Enforcement—General

Section 86.211 is changed in response to comments made by IRRC indicating clarification needed as to what constitutes off permit impacts as it relates to when a permittee may qualify for a violation abatement period of more than 90 days. The change involves clarifying when a surface coal mine operator would qualify for an abatement period in excess of 90 days for correcting a violation. The proposed rulemaking allowed for an abatement period in excess of 90 days due to labor strikes with the exception of violations causing or having the potential to cause off permit impacts. With the change "off permit impacts" are clarified to include environmental harm to air, water or land resources or danger to public health or safety.

(24) Section 87.17(a) Criteria for Approval of Application

Section 87.17 is changed to clarify that the Department will not issue, renew, or amend a surface mining license where any of the circumstances of § 87.17(a)(1)—(3) are present. Current proposed language implies that all of the circumstances of § 87.17(a)(1)—(3) must be present for surface mining license issuance, renewal, or amendment.

(25) Sections 87.50, 87.84, 88.33, 88.62, 88.491, 88.492, 89.74, 90.18 and 90.48 Fish and Wildlife Resource Information and Protection and Enhancement plans

These sections are added to include the fish and wildlife informational requirements for bituminous and anthracite surface mines, underground operations, and coal refuse disposal operations. These additions reflect the fish and wildlife informational requirements set forth in the Federal regulations at 52 **Federal Register** 47352 (December 11, 1987).

(26) Section 87.65(a)(4) Maps and Plans

Section 87.65 is changed to correct a grammatical error.

(27) Sections 87.102(a), 88.92(a), 88.187(a), 88.292(a), 89.52(c) and 90.102(a) Hydrologic Balance: Effluent Standards

Section 87.102(a), and related sections, are changed to reinstate language which was mistakenly omitted from the proposed rulemaking package. This language states that no person shall allow a discharge from an area disturbed by mining which exceeds the applicable effluent criteria.

(28) Sections 87.102(b)(1), 88.92(b)(1), 88.187(b)(1), 88.292(b)(1), 89.52(d)(1), and 90.102(b)(1) Hydrologic Balance: Effluent Standards

Section 87.102(b)(1), and related sections, are clarified to provide for the situation where a precipitation event is less than or equal to 10-year, 24-hour precipitation event. In addition, §§ 88.292(b)(1) and 90.102(b)(1) are clarified to provide for the situation where a precipitation event is less than or equal to a 1-year, 24-hour precipitation event. Also, the sections are clarified to delete the mistaken impression given in the proposed rulemaking package that a site that has achieved Stage II standards is considered to be reclaimed. Stage III must be completed before reclamation is final.

The sections are also changed to add a Group A effluent standard for surface runoff from areas where Stage II standards have been achieved, where dry weather is present. The change is necessary because a permittee must make a demonstration of a precipitation event in order to be entitled to Group B of Group C effluent limits. Since, in dry weather, a permittee cannot make such a demonstration, the addition of a Group A standard is necessary.

(29) Sections 87.102(b)(2), 88.92(b)(2), 88.187(b)(2), 88.292(b)(2), 89.52(d)(2), and 90.102(b)(2) Hydrologic Balance: Effluent Standards

Section 87.102(b)(2), and related sections, are changed to clarify that a permittee conducting mining activities must demonstrate the factors set forth in § 87.103 in order to be entitled to the alternative effluent limitations of Group B or C. Also, the change makes the section more grammatically proper.

(30) Sections 87.102(e), 88.92(e), 89.52(g), and 90.102(e) Hydrologic Balance: Effluent Standards

Section 87.102, and related sections, are changed to delete Legislative Reference Bureau changes to the proposed text to water quality chapter references. The change makes it clear that the discharge of water from areas disturbed by mining activities must meet the requirements of 25 Pa. Code chapters 91, 92, 93, 95, 97,101, and 102.

(31) Sections 87.103(a), 88.93(a), 88.188(a), 88.293(a), 89.53(a), and 90.103(a) Precipitation Event Exemption

Section 87.103(a), and related sections are changed in order to clarify that the alternative effluent limitations in § 87.102(a), and related sections, are those of Group B and Group C. The language in the proposed rulemaking package implies that Groups A, B, and C are all alternative effluent limitations.

(32) Sections 87.103(c), (d), (e); 88.93(c), (d), (e); 88.188(c), (d), (e); 88.293(c), (d), (e); 89.53(c), (c)(1), (c)(2), (d)(e); and 90.103(c), (c)(1), (c)(2), (d), (e) Precipitation Event Exemption

Section 87.103, and related sections, are changed to clarify and make consistent that only a permittee may apply for a precipitation event exemption. Currently, the terms "operator" and "permittee" are both set forth in § 87.103 and related sections.

(33) Sections 87.112(b), 88.102(b), 88.103, 88.198, 88.302(b), 88.303, 89.112 and 90.112(b) Hydrologic Balance: Dams, Ponds, Embankments, and Impoundments-design, Construction and Maintenance

Section 87.112(b), and related sections, are changed to incorporate the complete title of the U.S.D.A. Soil Conservation Service reference in which the design standards concerning impoundments are contained.

(34) Sections 87.112(f), 89.101(d) and 90.112(f) Hydrologic Balance: Dams, Ponds, Embankments and Impoundment—Design, Construction and Maintenance

Sections 87.112, 89.101 and 90.112 are changed to address OSMRE concerns indicating Pennsylvania's regulations do not specifically require submittal of plans to the Federal Mine Safety and Health (MSHA) for impoundments meeting MSHA size criteria specified in 30 CFR 77.216. The change involves adding requirements that plans for certain impoundments be submitted to the Federal Mine Safety and Health Administration.

(35) Sections 87.138, 89.82 and 90.150 Protection of Fish, Wildlife and Related Environmental Values

These sections are added to include the fish and wildlife performance requirements for bituminous surface and underground operations and coal refuse disposal operations. These additions reflect the fish and wildlife performance requirements set forth in the Federal regulations at 52 Federal Register 47352 (December 11, 1987).

(36) Section 87.148 Revegetation: Timing

Section 87.148 is changed in response to an IRRC comment indicating the language on when planting is required should be changed to provide clarity and maintain consistency. The change consisted of adding the words "full" and "prior to the end of." The change provides additional clarification as to when planting is required and when the Department may extend the time allowed for planting disturbed areas.

(37) Sections 88.93(b), 88.188(b), 88.293(b) and 89.53(b) Hydrologic Balance: Precipitation Event Exemption

These sections were changed in response to a comment received by the EQB indicating the rainfall amounts for 10-year, 24-hour precipitation events were not consistent with U.S. Weather Bureau data. The change consisted of modifying the rainfall amounts for 10-year, 24-hour precipitation events so as to be consistent with technical data. Also, data on 10-year, 24-hour precipitation events has been added to Section 88.293 to correspond to the revised refuse disposal rainfall exemptions.

(38) Section 89.26 Roads

Section 89.26 is changed to address OSMRE concerns indicating the change would be inconsistent with 30 CFR 817.151 as amended effective December 8, 1988 and published at 53 **Federal Register** 45190 (November 8, 1988). The change involves retaining the requirement that the design and construction of roads used in conjunction with underground mining activities be certified by a registered professional engineer.

(39) Section 89.143(a) Performance Standards

Section 89.143(a) has been changed in response to a petition filed by the Keystone Bituminous Coal Association (KBCA) with the EQB. The amendments to subsections (a) (1) and (2), and the addition of subsections (a) (3) and (4) more clearly define the term "maximize mine stability" which is contained in Section 5(e) of the Bituminous Mine Subsidence and Land Conservation Act. The final regulation fleshes out the term "maximize mine stability" as an operator either: (1) utilizing full extraction techniques which are likely to result in collapse of the underground mine workings and planned and controlled subsidence of the overlying surface lands within six months after the completion of mining in an area or (2) where an operator uses extraction techniques other than full extraction, assuring the long-term stability of mine roofs, mine floors, and coal pillars left by partial coal extraction.

Subsection (a)(1) was amended to define the mine stability requirements for full extraction mining. Full extraction mining is generally expected to include circumstances where between eighty (80) and one-hundred (100) percent of the coal in place is extracted. Under the revised regulations, an operator must design and implement full extraction techniques which are likely to result in both: (1) the collapse of the underground mine workings and (2) planned and controlled subsidence within six months after mining in an area. If an operator fails to effectuate the collapse of the underground mine workings and planned and controlled subsidence within the above time frames, subsection (a)(3) comes into play.

The regulatory change to subsection (a)(2) requires that an operator utilizing partial extraction mining techniques must design and implement a support plan which incorporates roof spans acceptable to the Department and which achieves a Department approved ratio of coal pillar strength to coal pillar load using engineering equations, values, and design considerations acceptable to the Department. The regulation puts a burden of demonstrating that mine stability will be maximized on the operator. Only equations, values, and design considerations which the Department finds to be acceptable may be utilized by an operator in demonstrating how mine stability will be maximized.

Subsection (a)(3) addresses the situation where an operator who utilizes full extraction mining techniques fails to effectuate collapse of the underground mine workings and planned and controlled subsidence with six months of mining in an area. Upon Department notification, an operator is required to either implement measures which result in collapse of the underground mine workings and planned and controlled subsidence, or design and implement the support measures required in subsection (a)(2).

Subsection (a)(4) makes clear that the revised regulation in no way lessens the current damage prevention standards of § 89.143(b) and the other performance standards set forth in subsections (c)–(f).

The Department believes that the language in the final regulation grants mine operators the flexibility to extract between 50–80% of the coal in place, as requested by the Keystone Bituminous Coal Association in their petition to the EQB, so long as they can demonstrate that they will maximize mine stability in doing so. Further, the current damage prevention requirements set forth in § 89.143(b) are not lessened in any way by the revised regulation.

(40) Section 90.103(b) Precipitation Event Exemption

Data on 1-year, 24-hour precipitation events is added to correspond to the revised refuse disposal rainfall exemptions.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is now seeking comments on whether the amendments proposed by Pennsylvania satisfy the applicable program approval criteria of 30 CFR 732.15. If the amendments are deemed adequate, they will become part of the Pennsylvania program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under **DATES** or at locations other than the Harrisburg Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4 p.m. on March 13, 1990. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment, and who wish to do so, will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendments may request a meeting at the Harrisburg Field Office by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings will be open to the public and, if possible, notices of meetings will be posted at the locations listed under **ADDRESSES**. A written summary of each meeting will be made part of the Administrative Record.

List of Subjects in 30 CFR Part 938

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: February 15, 1990.

Carl C. Close,

Assistant Director, Eastern Field Operations.

[FR Doc. 90–4213 Filed 2–23–90; 8:45 am]

BILLING CODE 4310-05-M

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30 CFR Part 938

Pennsylvania Regulatory Program; Reclamation of Bond Forfeiture Sites and Other Matters

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule: reopening and extension of public comment period.

SUMMARY: OSM is announcing the reopening and extension of a public comment period on a proposed amendment to the Pennsylvania permanent regulatory program (hereinafter referred to as the Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977. The amendment (OSM Administrative Record Number PA 612) includes revisions (Pub. L. 916, No. 181 signed by the Governor on October 12, 1984) to the Pennsylvania Surface Mining Conservation and Reclamation Act (SMCRA) pertaining to licensing requirements, water supply replacement insurance, permit issuance, prohibition of burning of underground anthracite coal, right of entry based on leases for bituminous, anthracite and non coal minerals, timing of informal conferences and permit review, reclamation of forfeited sites and the creation of a Mining and Reclamation Advisory Board. The amendments also include proposed regulations on bond forfeiture at chapter 86 to implement section 18 of the Pennsylvania SMCRA. Specifically, the existing regulations of chapter 86 at §§ 86.182 and 86.186–190 are proposed for amendment (16 *Pa. B.*, 1501, April 26, 1986).

Since the final rules published in the *Pennsylvania Bulletin* on February 7, 1987, (17 *Pa. B.*, 641) amend the proposed rules, § 86.188 and § 86.189, they are included as part of the amendment under consideration.

This notice sets forth the times and locations that the Pennsylvania program and the proposed amendment to that program are available for public inspection, the comment period during which interested persons may submit written comments on the amendment and the procedures that will be followed regarding the public hearing, if one is requested.

DATES: Written comments must be received on or before 4 p.m. on March 28, 1990 to ensure consideration in the rulemaking process. If requested, a public hearing on the amendment will be held at 9 a.m. on March 23, 1990. Requests to present testimony at the hearing must be received on or before 4 p.m. on March 13, 1990.

ADDRESSES: Written comments and requests to testify at the hearing should be mailed or hand delivered to Robert J. Biggi, Director, Harrisburg Field Office at the address listed below. Copies of the Pennsylvania program, the proposed amendment, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays

Each requestor may recieve, free of charge, on copy of the proposed amendment by contacting OSM's Harrisburg Field Office.

Office of Surface Mining Reclamation and Enforcement, Harrisburg Field Office, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone (717) 782–4036.

Pennsylvania Department of Environmental Resources, Office of Environmental Energy Management, 10th Floor, Fulton Building, 3rd and Locust Streets, P.O. Box 2063, Harrisburg, Pennsylvania 17120, Telephone (717) 787–4686.

A public hearing, if held, will be at the Penn Harris Motor Inn and Convention Center at the Camp Hill Bypass and U.S.

Routes 11 and 15, Camp Hill, Pennsylvania.

FOR FURTHER INFORMATION CONTACT: Robert J. Biggi, Director, Harrisburg Field Office, (717) 782–4036.

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program

The Secretary of the Interior conditionally approved the Pennsylvania program on July 31, 1982. Information on the background of the Pennsylvania program including the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Pennsylvania program can be found in the July 30, 1982 **Federal Register** (47 FR 33050). Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Discussion of Amendment

Pennsylvania Senate Bill 1078 provides for the conservation and improvement of land affected in connection with surface mining; regulating such mining; and providing penalties, providing for a separation of requirements for license issuance and permit issuance; affecting the license application requirement of liability insurance for water supply restoration or replacement; establishing content requirements of landowner consent forms; providing for conservation of reclaimed land; requiring advertisement for bids for reclamation of bond forfeiture areas; creating a Reclamation Advisory Board and establishing its duties; prohibition certain contracts; requiring contractors to pay workers at a particular rate; requiring publication of contracts awarded; and providing for publication of regulations.

The Governor signed Senate Bill 1078 into law (Pub. L. 916, No. 181) on October 12, 1984. This law amends the Pennsylvania SMCRA, including amendments to section 18 of Pennsylvania SMCRA. Section 18, as amended, sets forth a number of alternative approaches for reclaiming lands affected by surface mining operations through the use of monies in the Surface Mining Conservation and Reclamation Fund. The regulations (16 *Pa. B.*, 1501, April 26, 1986) were drafted to provide a regulatory structure for the implementation of these legislative amendments.

The regulations are also in response to petitions for rulemaking filed by Allan E. MacLeod in October 1982, and amended in March 1983. The rulemaking petitions ask, among other things, for the promulgation of regulations that would establish a grant program to landowners permitting reclamation for the amount of bond or, in the alternative, a grant program directly to county soil conservation districts to reclaim land for the amount of the bond. In addition, the petitions for rulemaking ask the Pennsylvania Environmental Quality Board to establish an expeditious procedure and to work with landowners who are interested in reclaiming sites for the amount of the bond.

The Pennsylvania Department of Environmental Resources (DER) proposes the following rulemaking actions (16 *Pa. B.*, 1501, April 26, 1986) Section and title:

Section 86.182. Procedures.
Section 86.186. Scope.
Section 86.187. Use of money.
Section 86.188. Evaluation of bond forfeiture sites.
This section revised in final rulemaking:
Section 86.189. Reclamation of bond forfeiture sites.
This section revised in final rulemaking:
Section 86.190. Sites where reclamation is unreasonable, unnecessary, or impossible.

The final rules published in the *Pennsylvania Bulletin* (17 *Pa. B.*, 641), February 7, 1987 amends § 86.188 and § 86.189. This rulemaking package is considered part of the amendment.

On March 3, 1987, OSM sent the Pennsylvania DER a list of 10 issues requiring modification or clarification (PA 634). These issues were discussed during the next few months culminating in a written response dated June 18, 1987 (PA 654) from DER on each specific issue. OSM's reply to this response stated that the information provided was valuable to OSM's continuing review of the amendment; however, two major issues were not properly clarified in the response. These issues deal with fiscal management practices for assuring adequate funds to reclaim primacy sites forfeited and reclamation standards for such sites. After numerous discussions between OSM and DER on these issues, DER provided a written response (PA 685) on February 1988. DER response to reclamation/performance issue was " * * * any change to the reclamation plan must meet the primacy requirements relating to postmining land use and ensuring the reclamation performance standards under the approved program are met." As for fiscal management of fund monies, the response states that monies not dedicated to reclamation of primacy sites during that year are utilized to reclaim interim program sites. While this approach may ensure timely use of fund monies, it could result in the misuse of monies dedicated by this amendment for primacy forfeited sites. Consequently, primacy forfeited sites bonded under the approved program could go unreclaimed for lack of funding.

While not tied to the amendment in question, OSM has been tracking the case dealing with alleged inadequate bonding (*Pennsylvania Federation of Sportsmen's Clubs, et al.* v. *DER et al. No. 1868, D.C. 1981.*) The settlement stiuplation and consent decree reached in 1988, paragraph E makes it clear DER intends to keep pre-primacy separate from primacy sites for reclamation and funding purposes. Thus OSM's concern about use of primacy monies for pre-primacy sites appears to be resolved. Additionally paragraph H. provides for monthly, quarterly and annual reports regarding adequacy of funds for reclamation of primacy sites. While not stated in this stipulation, the data included in the reports would require that a clear audit trail of primacy fund monies be maintained.

III. Public Comment Procedures

In accordance with the provisions of 30 CFR 732.17(h), OSM is now seeking comments on whether the revised amendment proposed by Pennsylvania satisfies the applicable program approval criteria of 30 CFR 732.15. If the amendments are deemed adequate, they will become part of the Pennsylvania program.

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Comments received after the time indicated under "Dates" or at locations other than the Harrisburg Field Office will not necessarily be considered in the final rulemaking or included in the Administrative Record.

Public Hearing

Persons wishing to comment at the public hearing should contact the person listed under.

FOR FURTHER INFORMATION CONTACT by 4 p.m. on March 13, 1990. If no one requests an opportunity to comment at a public hearing, the hearing will not be held.

Filing of a written statement at the time of the hearing is requested as it will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare adequate responses and appropriate questions.

The public hearing will continue on the specified date until all persons

scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment, and who wish to do so, will be heard following those scheduled. The hearing will end after all persons scheduled to comment and persons present in the audience who wish to comment have been heard.

Public Meeting

If only one person requests an opportunity to comment at a hearing, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed amendments may request a meeting at the Harrisburg field Office by contacting the person listed under

FOR FURTHER INFORMATION CONTACT.

All such meetings will be open to the pubic and, if possible, notices of meetings will be posted at the locations listed under.

ADDRESSES. A written summary of each meeting will be made part of the Administrative Record.

List of Subjects in 30 CFR Part 938

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: February 15, 1990.

Carl C. Close,

Assistant Director, Easter Field Operations.

[FR Doc. 90-4212 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900-AE40

Schedule for Rating Disabilities; The Cardiovascular System

AGENCY: Department of Veterans Affairs.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of Veterans Affairs (VA) is issuing an advance notice of proposed rulemaking (ANPRM) concerning that portion of the Schedule for Rating Disabilities which deals with disabilities of the cardiovascular system. This ANPRM is necessary because of a General Accounting Office (GAO) study and recommendation that the medical criteria in the rating schedule be reviewed and updated as necessary. The intended effect of this ANPRM is to solicit and obtain the comments and suggestions of various interest groups and the general public on necessary additions, deletions and revisions of terminology and how best to proceed with a systematic review of the medical criteria used to evaluate disabilities of the cardiovascular system. Other body systems will be subsequently scheduled for review until the medical criteria in the entire rating schedule have been analyzed and updated.

DATES: Written comments and submissions in response to this ANPRM must be received by VA on or before April 27, 1990.

ADDRESSES: Interested persons and organizations are invited to submit written comments and suggestions regarding this ANPRM to the Secretary of Veterans Affairs (271A), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420. All written submissions will be available for public inspection only in the Veterans Services Unit, Room 132, at the above address and only between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays) until May 7, 1990.

FOR FURTHER INFORMATION CONTACT: Phyllis Barber, Consultant, Regulations Staff (211B), Compensation and Pension Service, Veterans Benefits Administration, (202) 233-3005.

SUPPLEMENTARY INFORMATION: In December 1988 the GAO published a report entitled *Veterans' Benefits: Need to Update Medical Criteria Used in VA's Disability Rating Schedule* (GAO/HRD-89-28). After consulting numerous medical professionals and VA rating specialists GAO concluded that a comprehensive and systematic plan was needed for reviewing and updating VA's Schedule for Rating Disabilities (38 CFR Part 4). The medical professionals noted outdated terminology, ambiguous impairment classifications and the need to add a number of medical conditions not presently in the rating schedule. VA rating specialists noted that for some disorders they would prefer more medical criteria for distinguishing between various levels of severity and that inconsistent ratings may result when unlisted conditions had to be rated by analogy to other listed disorders. The GAO recommended that VA prepare a plan for a comprehensive review of the rating schedule and, based on the results, revise the medical criteria accordingly. It also recommended that VA implement a procedure for systematically reviewing the rating schedule to keep it updated. VA agreed to both recommendations, and this ANPRM is one step in a comprehensive rating schedule review plan which will ultimately be converted into a systematic, cyclical review process.

This ANPRM is the first stage in VA's consideration of what regulatory action to take, if any, with respect to revising and updating that portion of the rating schedule dealing with diabilities of the cardiovascular system (38 CFR 4.100 through 4.104). While we do not wish to limit comments in any way, it should be noted that our primary concern in this ANPRM is the medical criteria used to evaluate cardiovascular disabilities and not the percentage evaluations presently assigned to each level of severity

Interested organizations and individuals are invited to submit comments and suggestions for revising current medical criteria, adding additional disabilities and/or deleting certain rarely encountered disorders or transferring them to other sections of the rating schedule. Submissions may run the gamut from narrative discussions of individual rating criteria to wholesale format changes and substitute rating schedules. Where changes are suggested, we would also appreciate a recitation as to the scientific or medical authority for such changes. Early submissions will expedite the comment review process and are encouraged.

List of Subjects in 38 CFR Part 4

Handicapped, Pensions, Veterans.

Approved: February 15, 1990.

Edward J. Derwinski,

Secretary of Veterans Affairs.

[FR Doc. 90-4304 Filed 2-23-90; 8:45 am]

BILLING CODE 8320-01-M

38 CFR Part 4

RIN 2900-AE 41

Schedule for Rating Disabilities; The Endocrine System

AGENCY: Department of Veterans Affairs.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of Veterans Affairs (VA) is issuing an advance notice of proposed rulemaking (ANPRM) concerning that portion of the Schedule for Rating Disabilities which deals with disabilities of the endocrine system. This ANPRM is necessary because of a General Accounting Office (GAO) study and recommendation that the medical criteria in the rating schedule be reviewed and updated as necessary. The intended effect of this ANPRM is to solicit and obtain the comments and suggestions of various interest groups and the general public on necessary additions, deletions and revisions of

terminology and how best to proceed with a systematic review of the medical criteria used to evaluate disabilities of the endocrine system. Other body systems will be subsequently scheduled for review until the medical criteria in the entire rating schedule have been analyzed and updated.

DATES: Written comments and submissions in response to this ANPRM must be received by VA on or before April 27, 1990.

ADDRESSES: Interested persons and organizations are invited to submit written comments and suggestions regarding this ANPRM to the Secretary of Veterans Affairs (217A), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420. All written submissions will be available for public inspection only in the Veterans Services Unit, Room 132, at the above address and only between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays) until May 7, 1990.

FOR FURTHER INFORMATION CONTACT: Bob Manchester, Consultant, Regulations Staff (211B), Compensation and Pension Service, Veterans Benefits Administration, (202) 233–3005.

SUPPLEMENTARY INFORMATION: In December 1988 the GAO published a report entitled *Veterans' Benefits: Need to Update Medical Criteria Used in VA's Disability Rating Schedule* (GAO/HRD–89–28). After consulting numerous medical professionals and VA rating specialists GAO concluded that a comprehensive and systematic plan was needed for reviewing and updating VA's Schedule for Rating Disabilities (38 CFR Part 4). The medical professionals noted outdated terminology, ambiguous impairment classifications and the need to add a number of medical conditions not presently in the rating schedule. VA rating specialists noted that for some disorders they would prefer more medical criteria for distinguishing between various levels of severity and that inconsistent ratings may result when unlisted conditions had to be rated by analogy to other listed disorders. The GAO recommended that VA prepare a plan for a comprehensive review of the rating schedule and, based on the results, revise the medical criteria accordingly. It also recommended that VA implement a procedure for systematically reviewing the rating schedule to keep it updated. VA agreed to both recommendations and this ANPRM is one step in a comprehensive rating schedule review plan which will ultimately be converted into a systematic, cyclical review process.

This ANPRM is the first stage in VA's consideration of what regulatory action to take, if any, with respect to revising and updating that portion of the rating schedule dealing with disabilities of the endocrine system (38 CFR 4.199). While we do not wish to limit comments in any way, it should be noted that our primary concern in this ANPRM is the medical criteria used to evaluate endocrine disabilities and not the percentage evaluations presently assigned to each level of severity.

Interested organizations and individuals are invited to submit comments and suggestions for revising current medical criteria, adding additional disabilities and/or deleting certain rarely encountered disorders or transferring them to other sections of the rating schedule. Submissions may run the gamut from narrative discussions of individual rating criteria to wholesale format changes and substitute rating schedules. Where changes are suggested, we would also appreciate a recitation as to the scientific or medical authority for such changes. Early submissions will expedite the comment review process and are encouraged.

List of Subjects in 38 CFR Part 4

Handicapped, Pensions, Veterans.

Approved: February 15, 1990.

Edward J. Derwinski,

Secretary of Veterans Affairs.

[FR Doc. 90–4305 Filed 2–23–90; 8:45 am]

BILLING CODE 8320–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 84–231, RM–6706, RM–6406, RM–5381, RM–5094, and 5604; FCC 90–50]

Radio Broadcasting Services; Shreveport, Bastrop, Homer, Ruston, Vivian and Jonesboro, Louisiana, El Dorado and Stamps, Arkansas, Atlanta, Henderson and San Augustine, Texas

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document is issued as a result of the decision of the U.S. Court of Appeals in *Reeder* v. *FCC*, 865 F2d 1298 (D.C. Cir. 1989). This document sets forth twelve different proposals involving a possible upgrade by Station KMJJ–FM, Channel 261A, Shreveport, Louisiana, and related allotment changes in Louisiana, Arkansas, and Texas. These proposals are as follows:

Proposal 1

Community	Channel No.	
	Present	Proposed
Homer, Louisiana	260A	278A or 283A
Shreveport, Louisiana	261A	259C1
San Augustine, Texas	260A	281A

Proposal 2

Community	Channel No.	
	Present	Proposed
Homer, Louisiana	260A	283A
Ruston, Louisiana	258A	239A
San Augustine, Texas	260A	223A
Shreveport, Louisiana	261A	259C1
Vivian, Louisiana, 239A	238A	

Alternate Proposal 2

Community	Channel No.	
	Present	Proposed
Stamps, Arkansas		238A

Proposal 3

Community	Channel No.	
	Present	Proposed
Homer, Louisiana	260A	283A
Shreveport, Louisiana	261A	259C2

Alternate Proposal 3

Community	Channel No.	
	Present	Proposed
Atlanta, Texas	257A	259C2

Proposal 4

Community	Channel No.	
	Present	Proposed
Shreveport, Louisiana	261A	259C1
Homer, Louisiana	260A	239A
Ruston, Louisiana	258A	231A
Vivian, Louisiana	239A	238A
San Augustine, Texas	260A	223A

Alternate Proposal 4

Community	Channel No.	
	Present	Proposed
Stamps, Arkansas		238A
El Dorado, Arkansas	240A	241C1
Bastrop, Louisiana	232A	230C2

Proposal 5

Community	Channel No.	
	Present	Proposed
Shreveport, Louisiana	241A	259C2
Vivian, Louisiana	239A	238A
Homer, Louisiana	260A	239A

Proposal 6

Community	Channel No.	
	Present	Proposed
Bastrop, Louisiana	232A	230C2
Shreveport, Louisiana	261A	259C2
Homer, Louisiana	260A	285A
Jonesboro, Louisiana	285A	238A
Atlanta, Texas	257A	261C2
Henderson, Texas	261A	260A
San Augustine, Texas	260A	223A

Alternate Proposal 6

Community	Channel No.	
	Present	Proposed
El Dorado, Arkansas	257A	258C2 or 254C3
Ruston, Louisiana	258A	241A
Hamburg, Arkansas	258A	230A

In addition this document orders Jackson Parish Broadcasting, licensee of Station KTOC–FM, Channel 285A, Jonesboro, Louisiana, to slow cause why its license should not be modified to specify operation on Channel 238A; and Dean Broadcasting, Inc., licensee of Station KGRI–FM, Channel 261A, Henderson, Texas, why its license should not be modified to specify operation on Channel 260A.

DATES: Response and comments must be filed on or before April 16, 1990, and reply comments on or before May 1, 1990.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows:

KIXK, Inc., c/o Miller & Fields, P.O. Box 33003, Washington, DC 20033

Noalmark Broadcasting Corp., Radio Station KAYZ, 2525 North West Avenue, El Dorado, Arkansas 71730

Ark-La-Tex Broadcasting Co., Radio Station KPYN, Box 858, Atlanta, Texas 75751

Dean Broadcasting, Inc., Radio Station KGRI–FM, Box 1400, Henderson, Texas 75652

Jamie Patrick Broadcasting, Inc., Radio Station KTRY–FM, Shelton Road, Bastrop, Louisiana 71220

Radio USA, Ltd., c/o Wiley, Rien & Fielding, 1776 K Street, NW., Washington, DC 20006

El Dorado Broadcasting Company, Radio Station KLBQ, c/o Lauren A. Colby, P.O. Box 113, Frederick, Maryland 21701

Jackson Parish Broadcasting, Inc., Radio Station KTOC–FM, 1300 Gansville Road, Jonesboro, Arkansas 71251

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Further Notice of Proposed Rule Making* and Order to Show Cause MM Docket No. 89–231, adopted February 1, 1990, and released February 20, 1990. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW, Suite 140, Washington, DC 20037. Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts. For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 90–4276 Filed 2–23–90; 8:45 am]

BILLING CODE 6712–01–M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1152

[Ex Parte No. 274 (Sub-No. 19)]

Increasing the Offer of Financial Assistance Purchase Price to Compensate for the Tax Liability Incurred on the Sale of Personal Property

AGENCY: Interstate Commerce Commission.

ACTION: Discontinuance of proceeding.

SUMMARY: The Commission has issued a decision discontinuing this proceeding. The Commission has determined, after consideration of the comments received, that rules of general applicability are unnecessary, and that case-by-case adjudication is the appropriate vehicle for handling this matter.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275–7245. [TDD for hearing impaired: (202) 275–1721].

SUPPLEMENTARY INFORMATION: On July 27, 1988, (53 FR 28418, July 28, 1988), the Commission issued an advance notice of proposed rulemaking to obtain public comment on whether to prescribe rules to govern compensation of carrier-vendors for any tax liability they may incur upon the forced sale of personal property under the financial assistance procedures of 49 U.S.C. 10905.

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services (202) 275–1752.]

Decided: February 16, 1990.

By the Commission, Chairman Gradison, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett.

Noreta R. McGee,

Secretary

[FR Doc. 90–4288 Filed 2–23–90; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AB31

Endangered and Threatened Wildlife and Plants; Reopening of Comment Period on Proposed Endangered Status for Bartram's Ixia and Extension of Deadline for Publication of Final Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of reopening of comment period and extension of deadline to publish a final regulation.

SUMMARY: The U.S. Fish and Wildlife Service gives notice that the comment period is reopened on its proposal to determine endangered status for Bartram's ixia, a plant native to northeastern Florida. The Service also gives notice that the 1-year deadline for publication of a final regulation or withdrawal of the proposal is extended by 6 months. Several individuals responding to the proposed rule requested extra time to collect additional data on the distribution and

abundance of this plant during its flowering season in May and June of 1990.

DATES: Comments must be received by July 2, 1990. The deadline for publishing a final rule listing Bartram's ixia as an endangered or threatened species is extended from May 19, 1990, to November 19, 1990.

ADDRESSES: Comments and materials concerning this proposal should be sent to the Field Supervisor, Jacksonville Field Office, U.S. Fish and Wildlife Service, 3100 University Boulevard South, Suite 120, Jacksonville, Florida 32216. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: David J. Wesley, Field Supervisor, at the above address (telephone: 904/791-2580 or FTS 946-2580).

SUPPLEMENTARY INFORMATION:

Background

Bartram's ixia (*Solpingostylis coelestina*, also called *Sphenostigma coelestinum*) is a member of the iris family with a limited distribution in northeastern Florida, south and west of Jacksonville. The plant occurs in pine flatwoods in Baker, Bradford, Clay, Putnam, and St. Johns counties. It is known to have occurred in Union County; a recent report of the plant in that county is almost certainly reliable. Bartram's ixia is jeopardized by changes in management of its habitats, including the declining incidence of prescribed burning of flatwoods, and by destruction of its habitat as the Jacksonville urban area expands to the south.

The Service published a proposal to determine Bartram's ixia to be an endangered species in the **Federal Register** of May 19, 1989 (54 FR 21632). Several comments on the proposal questioned the sufficiency of the sufficiency of the available data, especially with respect to whether adequate searches had been conducted for Bartram's ixia outside of its know range, and of its abundance on private property within its known range. One comment, by a forest resources company, offered assistance to install field trials to evaluate effects of various silvicultural activities on plant survival and reproduction." Such studies could be initiated in 1990, although they would require a number of years to be completed.

As a result of comments received on the proposal, the Service finds that there is a substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the decision on whether to list Bartram's ixia. When such disagreement exists, section 4(b)(6)(B)(i) of the Endangered Species Act of 1973, as amended, allows and extension of up to 6 months of the 1-year period within which the Service must ordinarily take final action on a proposal to list a species. Accordingly, final action on the proposal must now be taken by November 19, 1990. The comment period is extended through July 2, 1990, to provide time for interested parties, including landowners, to conduct invertories of Bartram's ixia during the spring flowering period.

The Service hereby solicits additional information on the status of Bartram's ixia with regard to available conservation measures, especially information on the present or threatened destruction, modification, or curtailment of its habitat or range, and whether the species is in danger of extinction in a significant portion of its range. Data on the distribution of Bartram's ixia and observations of Bartram's ixia populations that provide insight into the response of this plant to forestry practices or to right-of-way management practices are particularly sought.

Author

This notice was prepared by Mr. David Martin (see ADDRESSES section).

Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531–1543).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Fish, Marine mammals, Plants (agriculture).

Dated: February 20, 1990.

Richard N. Smith,

Director, Fish and Wildlife Service.

[FR Doc. 90-4300 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-55-M

Notices

Federal Register
Vol. 55, No. 38
Monday, February 26, 1990

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Scrapie Negotiated Rulemaking Advisory Committee; Establishment

AGENCY: U.S. Department of Agriculture (USDA).

ACTION: Notice of intent to establish committee.

SUMMARY: USDA announces its intent to establish an advisory committee to frame a recommended rulemaking proposal designed to develop alternatives to the current regulatory program for the control of scrapie. This committee, called the Scrapie Negotiated Rulemaking Advisory Committee, will be comprised of representatives of parties with a definable stake in the outcome of the proposed rule.

DATES: Consideration will be given only to comments received on or before March 28, 1990.

ADDRESSES: Send an original and three copies of written comments to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 89–139. Comments received may be inspected at Room 1141 of the South Building, 14th Street at Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: David Galbreath, Animal Health and Depredation Management Systems, PPD, APHIS, USDA, Room 806, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301–436–8017.

SUPPLEMENTARY INFORMATION:

Background

On November 2, 1988, we published in the **Federal Register** (53 FR 44200–44202, Docket No. 88–131) an advance notice of proposed rulemaking that solicited comments on whether to remove the regulations for destroying animals because of scrapie and discontinue the Scrapie Eradication Program (the Program) while we considered alternative programs for controlling the disease.

Scrapie is a highly transmissible and fatal disease of sheep and goats that affects the central nervous system. The incubation period for the disease lasts several years, and it generally cannot be detected until the animal becomes symptomatic. There is no known diagnostic test confirming the presence of scrapie in a live animal, and no known treatment for the disease. The current Program depends largely upon State regulations and resources, and there are variations among the States' mechanisms for controlling the spread of the disease.

On July 13, 1989, we published in the **Federal Register** (54 FR 29576, Docket No. 89–079), a second advance notice in which we responded to the comments we received addressing Docket No. 88–131. In the July 13th notice, we informed the public of our determination to continue the current program until development of a revised and improved scrapie program had been explored. The commenters represented numerous diverse interests, including State and Federal government officials, industry associations, sheep producers, breeders, farmers, veterinarians, and other individuals. A number of the commenters stressed that a successful scrapie control or eradication program would require the support of the divergent interests affected by the disease. Many commenters felt that a continuing dialogue among the different factions of the sheep and goat industries and Federal and State regulatory officials should be encouraged.

The comments we received suggest that it would be highly desirable to involve all interested parties in developing an effective, uniform program that could be implemented through cooperative Federal-State efforts. In the July 13 notice, we stated that we were considering the regulatory option of conducting a negotiated rulemaking in order to develop such a program. We believe that consensus on a scrapie program is attainable, and that we should proceed with negotiated rulemaking.

Negotiated Rulemaking

Negotiated rulemaking is a consensus-based approach to the promulgation of agency rules. It is an effective tool for developing regulatory solutions to problems that affect diverse, and often, competing, interests among the regulated public. By participating in this effort, interested parties have more direct input into the substance of a proposed rule than they would through usual notice and comment rulemaking. These parties agree to work together until they reach consensus on the content of the rule. In this manner, negotiated rulemaking enables an agency to avoid many of the obstacles that might be raised in a usual notice and comment proposed rulemaking and expedites the promulgation and implementation of a final rule.

We therefore intend to establish a Scrapie Negotiated Rulemaking Advisory Committee (Committee), chartered under the Federal Advisory Committee Act (Pub. L. 92–463). The Committee will advise the Department on the content of a regulatory program designed to control scrapie.

The establishment of this Committee is necessary and in the public interest in connection with the duties and responsibilities of the Administrator of the Animal and Plant Health Inspection Service (APHIS) in preventing the interstate spread of animal diseases. These duties and responsibilities include the promulgation of regulations. The Committee is intended to serve as a public forum in which interested parties can discuss and resolve the issues involved in developing a regulatory program to prevent the interstate spread of scrapie. We believe that this process will allow APHIS to develop regulations for an effective scrapie program.

Potential Issues for Discussion

The characteristics of the disease, the need for scientific information concerning the spread of the disease, the lack of a diagnostic test to confirm the disease in a live animal, and the absence of an effective treatment for a symptomatic animal make us uncertain what elements must be included in an effective scrapie program.

We anticipate that the Committee will need to address the following issues in formulating a proposal:

• How are flock management procedures related to transmission of the disease?

• What depopulation policy will control the spread of scrapie and prevent program abuses?

• Given the long incubation period of the disease, can a system of maintaining flock records be effective in preventing the introduction of the disease into an unaffected flock?

• Is a flock certification program desirable and feasible?

• Would a system of permanent animal identification be effective in controlling the spread of scrapie?

• What quarantine and surveillance procedures should be adopted and uniformly applied to all States?

• Should a program of indemnities be continued, and, if so, what should be the basis for determining an indemnity payment system?

• What should the procedural requirements be for reporting suspected cases of scrapie?

• What would be the roles and responsibilities of interested parties, including producers, industry groups, and Federal and State officials?

Guidelines

The following guidelines would apply to this negotiated rulemaking, subject to appropriate changes made as a result of comments received on this notice or as determined necessary during the negotiation process:

1. *Facilitator.* APHIS will use a facilitator. The facilitator, a neutral third party, will not be involved with the substantive development of the regulation. The facilitator's role is to chair negotiating sessions, to act as a mediator, to help the negoiations proceed smoothly, and to help the participants define and reach consensus.

2. *Good faith negotiation.* Since participants must be willing to negotiate in good faith, each organization must authorize a senior official to represent its interests and to negotiate on its behalf.

3. *Administrative support and meetings.* APHIS will provide staff support for the Committee. Meetings will be held in Washington, DC.

4. *Consensus.* The goal of the negotiating process is consensus. Generally, consensus means that each member concurs in the result.

5. *Record of meeting.* In accordance with the Federal Advisory Committe Act, APHIS will keep a record of all Committee meetings. The record will be placed in the administrative record for this rulemaking, and made available for public inspection upon request. Meeting will be open to the public.

6. *Committee procedures.* Under the general guidance and direction of the facilitator and subject to applicable legal requirements, the members of the Committee will establish detailed procedures for the conduct of their Committee meetings.

7. *Schedule.* The time and location of Committee meetings will be announced in the **Federal Register.**

8. *Participants.* The Committee will consist of not more than 25 members and a facilitator. Participation by more than 25 persons could make it difficult to conduct effective negotiations. One purpose of this notice is to help determine whether regulations concerning scrapie would substantially affect interest not adequately represented by the proposed participants listed in this Notice. We do not believe that each potentially affected organization must have its own representative on the Committee. However, we firmly believe that each interest must be adequately represented. Moreover, we must be satisfied that the group as a whole reflects a proper balance and mix of interests. Equal opportunity practices, consistent with U.S. Department of Agriculture policies, will be followed in all appointments to the Committee.

APHIS has tentatively identified the following interests and parties as potential participants on the Scrapie Negotiated Rulemaking Advisory Committee:

The Sheep and Goat Industry

American Suffolk Sheep Society
National Suffolk Sheep Association
American Hampshire Sheep Association
American Sheep Industry Association

Related Industry Groups

United States Animal Health Association
American Veterinary Medical Association
American Farm Bureau Federation

Federal Government

Animal and Plant Health Inspection Service, USDA

State regulatory officials

Comments on this tentative list of participants are invited, as are suggestions of other potential participants. We are also interested in comments on participation by groups representing consumer, environmental, and other scientific interests. Please keep in mid, however, that it is not necessary that every concerned organization be represented, so long as every significant interest is represented. Negotiation sessions will be open to the public. Individuals and organizations without designated representatives on the Committee may attend sessions and communicate informally with members of the Committee.

Done in Washington, DC, this 14th day of February 1990.

Adis M. Vila,

Assistant Secretary for Administration.

[FR Doc. 90-4278 Filed 2-23-90; 8:45 am]

BILLING CODE 3410-34-M

Forest Service

Implementation of Management Activities in the Jim/Fatty Area, Flathead National Forest, Flathead County, MT

AGENCY: Forest Service, USDA.

ACTION: Rescission of notice of intent to prepare an environmental impact statement.

SUMMARY: On August 31, 1988, notice was published in the **Federal Register** (53 FR 33511) that an environmental impact statement would be prepared to assess the effects of proposed forest management activities, including timber harvest, in the Jim/Fatty area located on the Swan Lake Ranger District of the Flathead National Forest. That notice is hereby cancelled.

The Flathead National Forest is currently clarifying forest-wide direction pertaining to several management issues including management of habitat for the threatened grizzly bear and management indicator species. Until clarifications of these management issues are finalized, the proposed timber harvest activities are withdrawn. Analysis of proposed activities that do not include major timber harvest will continue. Appropriate environmental documentation will be completed for proposed projects. If any proposed activities may have a significant effect on the quality of the human environment, new notices of intent to prepare environmental impact statements will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Earl Sutton, District Planner, Swan Lake Ranger District, P.O. Box 370, Bigfork, Montana 59911, [Telephone (406) 837-5081].

Dated February 8, 1990.

William L. Pederson,

District Ranger, Swan Lake Ranger District, Flathead National Forest.

[FR Doc. 90-4225 Filed 2-23-90; 8:45 am]

BILLING CODE 3410-11-M

Environmental Impact Statement for Bark Beetle Infestation in Ponderosa Pine Stands on the Uncompahgre National Forest; Grand Mesa, Uncompahgre and Gunnison National Forests, Montrose, Ouray, San Miguel and Mesa Counties, CO

AGENCY: Forest Service, USDA.

ACTION: Notice; Intent to prepare Environmental Impact Statement.

SUMMARY: The Forest Service will prepare an Environmental Impact Statement (EIS) on management issues related to ponderosa pine vegetative type on the Uncompahgre National Forest that has been infested or has the potential to become infested with the pine bark beetle. Three species of pine beetle are currently at epidemic proportions, with no indication of population decrease. The Colorado State Forest Service will participate as a cooperating agency in the preparation of the Environmental Impact Statement.

DATES: Written comments concerning the scope of the analysis should be received on or before March 30, 1990.

ADDRESSES: Send written comments to District Ranger, Norwood Ranger District, P.O. Box 388, Norwood, CO, 81423.

FOR FURTHER INFORMATION CONTACT: Dick Cook, District Ranger, Norwood Ranger District, (303) 327–4261.

SUPPLEMENTARY INFORMATION: The area to be analyzed includes some lands in private ownership, an unroaded area, a proposed Research Natural Area and lands that are being managed for timber, wildlife, watershed and other multiple use purposes.

Alternatives to be investigated range from: (1) No suppression of the bark beetle to: (2) full suppression including an extensive reforestation program. Preliminary issues identified include:

1. Loss of the ponderosa pine vegetative type;
2. Change in wildlife habitat;
3. Decrease in visual quality;
4. Increase in fuels and fire susceptibility;
5. Economics of forest management practices;
6. Effects of management/nonsuppression on adjacent private lands.

The draft and final environmental impact statement are expected to be filed by July 1, 1990, and October 1, 1990, respectively. Two open houses and a public meeting will be held to encourage public participation in the identification of issues and the development of alternatives. These are scheduled as follows:

Open House—March 12, 1990, 3–8 p.m., Forest Service Regional Office, 11177 W. 8th Avenue, Lakewood, CO

Open House—March 19, 1990, 3–8 p.m., Forest Service, Ouray District Office, 2505 S. Townsend, Montrose, CO

Public Meeting—March 21, 1990, 7 p.m., The Log Cabin, 1120 Lucerne, Norwood, CO

R.E. Greffenius, Forest Supervisor, Grand Mesa, Uncompahgre and Gunnison National Forests, is the responsible official.

Dated: February 12, 1990.

R.E. Greffenius,

Forest Supervisor.

[FR Doc. 90–4226 Filed 2–23–90; 8:45 am]

BILLING CODE 3410–11–M

Soil Conservation Service

Midway Elementary Critical Area Treatment RC&D Measure Plan, West Virginia; Finding of No Significant Impact

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of a Finding of No Significant Impact.

SUMMARY: Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR part 1500); and the Soil Conservation Service Guidelines (7 CFR part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Midway Elementary Critical Area Treatment RC&D Measure, Lincoln County, West Virginia.

FOR FURTHER INFORMATION CONTACT: Rollin N. Swank, State Conservationist, Soil Conservation Service, 75 High Street, Morgantown, West Virginia 26505 Telephone 304-291-4151.

SUPPLEMENTARY INFORMATION: The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a reuslt of these findings, Mr. Rollin N. Swank, State Conservationist, has determined that the preparation and review of an environmental impact statement are not needed for this project.

The purpose of the measure is critical area treatment. The measure is designed to stabilize by regrading and shaping, and revegetating approximately 1.0 acres of land that has an average erosion rate of 40 tons per acre per year. Conservation practices include critical area treatment and seeding.

The Notice of a Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various Federal, State, and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment are on file and may be reviewed by contacting Rollin N. Swank, State Conservationist.

No administrative action on implementation of the proposal will be taken until 30 days after the date of this pubication in the **Federal Register.**

Rollin N. Swank,

State Conservationist.

February 12, 1990.

[This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.901—Resource Conservation and Development—aand is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials]

[FR Doc. 90–4224 Filed 2–23–90; 8:45 am]

BILLING CODE 3410–16–M

Pennsboro Critical Area Treatment RC&D Measure Plan, West Virginia; Finding of No Significant Impact

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of a Finding of No Significant Impact.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines, (40 CFR part 1500); and the Soil Conservation Service Guidelines. (7 CFR part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Pennsboro Critical Area Treatment RC&D Measure, City of Pennsboro, Ritchie County, West Virginia.

FOR FURTHER INFORMATION CONTACT: Rollin N. Swank, State Conservationist, Soil Conservation Service, 75 High Street, Morgantown, West Virginia 26505 Telephone 304–291–4151.

SUPPLEMENTARY INFORMATION: The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Mr. Rollin N. Swank, State Conservationist, has determined that the preparation and review of an

environmental impact statement are not needed for this project.

The purpose of the measure is critical area treatment. The measure is designed to stabilize by regrading and shaping, and revegetating approximately 10.0 acres of land that has an average erosion rate of 40 tons per acre per year. Conservation practices include critical area treatment and seeding.

The Notice of a Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various Federal, State, and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment are on file and may be reviewed by contacting Rollin N. Swank, State Conservationist.

No administrative action on implementation of the proposal will be taken until 30 days after the date of this publication in the **Federal Register.**

Dated: February 12, 1990.

Rolling N. Swank,

State Conservationist.

This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.901—Resource Conservation and Development—and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

[FR Doc. 90-4221 Filed 2-23-90; 8:45 am]

BILLING CODE 3410-16-M

DEPARTMENT OF COMMERCE

Agency Information Collection Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Institute of Standards and Technology.

Title: National Voluntary Laboratory. Accreditation Program (NVLAP). Information Collection System.

Form Number: NIST-1144.

Type of Request: Revision of a currently approved collection.

Burden: 1,200 respondents; 2,400 reporting hours.

Average Time Per Response: 2.0 hours per response.

Needs and Uses: NVLAP is a system for accrediting testing laboratories found competent to perform specific tests or types of tests. Competence is defined as the ability of a laboratory to meet the NVLAP conditions (15 CFR 7.32) and to conform to the criteria (15 CFR 7.33) as tailored and interpreted for the test methods, types of test methods, products, services, or standards for which the laboratory seeks accreditation.

In order to become accredited and maintain accreditation, a laboratory shall supply, upon request, certain information as published in 15 CFR 7.32(b), including information as may be needed for the specific laboratory accreditation program(s) in which accreditation is sought.

The information submitted by a laboratory seeking accreditation is an integral part of the NVLAP evaluation process. It is reviewed individually by technical and administrative staff and is used in conjunction with on-site assessments and proficiency testing to determine if the laboratory meets NVLAP accreditation requirements. The accreditation decision cannot be made without this information.

Affected Public: State or local governments, businesses or other for-profit, Federal agencies or employees, non-profit institutions, small businesses or organizations.

Frequency: Annually and on occasion.

Respondent's Obligation: Required to obtain or retain a benefit.

OMB Desk Officer: Robert Veeder, 395-3785.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer Edward Michals, (202) 377-3271, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Robert Veeder, OMB Desk Officer, room 3235, New Executive Office Building, Washington, DC 20503.

Dated: February 20, 1990.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 90-4270 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-13-M

Agency Information Collection Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration.

Title: Atlantic Bluefin Tuna Dealer Report Forms.

Form Number: NOAA Form 88-144; OMB—N/A.

Type of Request: New collection.

Burden: 127 respondents; 395 reporting hours; average hours per response—.042 hours.

Needs and Uses: Information is needed to comply with an international obligation to provide biological statistics and to monitor quotas as required of all nations party to the International Commission for the Conservation of Atlantic Tunas. Approximately 127 dealers of Atlantic bluefin tuna are affected.

Affected Public: Individuals or households, business or other for profit, small businesses or organizations.

Frequency: On occasion, weekly.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ronald Minsk, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer Edward Michals, (202) 377-3271, Department of Commerce, room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230. Written comments and recommendations for the proposed information collection should be sent to Ronald Minsk, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: February 20, 1990.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 90-4271 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-CW-M

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Construction Project Report (State and Local Governments) C-700 (SL)-A, C-700 (SL)-B.

Form Number(s): C-700 (SL)-A, C-700 (SL)-B.

Agency Approval Number: None.

Type of Request: New collection.

Burden: 400 hours.

Number of Respondents: Form A: 50, Form B: 250.

Avg Hours Per Response: Form A: 3 hours, Form B: 1 hour.

Needs and Uses: A recent investigation revealed that many respondents to the Construction Project Report (State and Local Governments) (Form C–700(SL)) either ignored critical questions or reported incorrect information. This submission requests clearance of a revised version of Form C–700 (SL), (Form A), which The Census Bureau will use to collect data monthly from a sample of 50 respondents for the duration of new construction projects. We will send Form B to these respondents at the end of the project and to 200 completed sample cases to verify data reported. We will use the results of this field testing for evaluation purposes only to revise Form C–700 (SL) as required. The test forms are also designed to gauge the availability of data for completed projects.

Affected Public: State or local governments.

Frequency: One time only.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Don Arbuckle, 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Clearance Officer, (202) 377–3271, Department of Commerce, room H6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Don Arbuckle, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: February 13, 1990.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 90–4272 Filed 2–23–90; 8:45 am]

BILLING CODE 3510–07–M

Bureau of Export Administration

Materials Technical Advisory Committee; Partially Closed Meeting

A meeting of the Materials Technical Advisory Committee will be held March 15, 1990, 10:30 a.m., Herbert C. Hoover Building, room 1617–F, 14th Street and Constitution Avenue, NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions which affect the level of export controls applicable to materials or technology.

Agenda

General Session:

1. Opening Remarks by the Chairman & Commerce Representative.
2. Introduction of Members and Visitors.
3. Presentation of Papers or Comments by the Public.
4. Introduction of New Members.
5. Discussion of Secrecy Orders on Patent Applications.
6. Second Quarterly Revision of ECCNs Assigned to the Committee.

Executive Session:

7. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. and COCOM control programs and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, in order to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that you forward your public presentation materials two weeks prior to the meeting to the below listed address:

Ms. Ruth D. Fitts, U.S. Department of Commerce/BXA, Office of Technology & Policy Analysis, 14th & Constitution Avenue, NW., Room 4069A, Washington, DC 20230.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on May 13, 1988, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings or portions of meetings of the Committee and of any Subcommittee thereof, dealing with the classified materials listed in 5 U.S.C. 552(c)(1) shall be exempt from the provisions relating to public meetings or portions thereof will be open to the public. A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, room 6628, U.S. Department of Commerce, Washington, DC. For further information or copies of the minutes call Ruth D. Fitts, 202–377–4959.

Dated: February 20, 1990

Betty A. Ferrell,

Director, Technical Advisory Committee Unit, Office of Technology and Policy Analyses.

[FR Doc. 90–4262 Filed 2–23–90; 8:45 am]

BILLING CODE 3510–DT–M

International Trade Administration

[C–201–505]

Porcelain-on-Steel Cookingware From Mexico; Final Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Final Results of Countervailing Duty, Administrative Review.

SUMMARY: On December 19, 1989, the Department of Commerce published the preliminary results of its administrative review of the countervailing duty order on porcelain-on-steel cookingware from Mexico. We have now completed that review and determine the net subsidy to be 2.18 percent *ad valorem* during the period January 1, 1988 through December 31, 1988.

EFFECTIVE DATE: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Anne Driscoll or Michael Rollin, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377–2786.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 1989, the Department of Commerce ("the Department") published in the **Federal Register** (54 FR 51913) the preliminary results of its administrative review of the countervailing duty order on porcelain-on-steel cookingware from Mexico (51 FR 44827; December 12, 1986). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of Review

Imports covered by this review are shipments of porcelain-on-steel cookingware from Mexico. The products are porcelain-on-steel cookingware (except teakettles), which do not have self-contained electric heating elements. All of the foregoing are constructed of steel, and are enameled or glazed with vitreous glasses. During the review period, such merchandise was classifiable under item number 645.0818 of the *Tariff Schedules of the United States Annotated.* This merchandise is currently classifiable under item number 7323.94.0020 of the *Harmonized Tariff Schedule* (HTS). The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

The review covers the period January 1, 1988 through December 31, 1988 and 10 programs: (1) FOMEX; (2) FONEI; (3) CEPROFI; (4) FOGAIN; (5) Bancomext preferential financing; (6) Import duty reductions and exemptions; (7) NDP preferential discounts; (8) Article 15 loans; (9) State tax incentives; and (10) Debt/equity swaps.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. On January 18, 1990, we received a written comment from the respondents, Troqueles Y Esmaltes, S.A. ("TRES") and CINSA, S.A.

Comment: The respondents argue that the Department should recalculate the duty deposit rate for FOMEX pre-export loans using benchmark and interest rates from the fourth quarter of 1988. Because the Costo Porcentual Promedio (CPP) rate declined from an annual average of 125.19 in the first quarter to an annual average of 42.39 percent in the fourth quarter, the respondents contend that the Department's methodology inflates the duty deposit rate and does not fairly estimate the current level of subsidization.

Department's Position: We disagree. In an administrative review, the Department's analysis of subsidy activity during the review period normally forms the basis of the estimated countervailing duty cash deposity rate. However, the Department will adjust the cash deposit rate for program-wide changes occurring subsequent to the review period. A progarm-wide change must be implemented by an official act, such as the enactment of a statute or regulation or the issuance of a decree, or be contained in the schedule of an existing statute, regulation or decree. Because the respondents have not demonstrated that the decrease in the FOMEX pre-export rates constitutes a program-wide change that occurred subsequent to the review period, the Department has established the cash deposit rate in accordance with its standard methodology.

Final Results of Review

After reviewing all of the comments received, we determine the net subsidy to be 2.18 percent *ad valorem* during the period January 1, 1988 through December 31, 1988.

The Department will therefore instruct the Customs Service to assess countervailing duties of 2.18 percent of the f.o.b. invoice price on all shipments of this merchandise exported on or after January 1, 1988 and on or before December 31, 1988.

Further, as provided by section 751(a)(1) of the Tariff Act, the Department will instruct the Customs Service to collect a cash deposit of estimated countervailing duties of 2.18 percent of the f.o.b. invoice price on shipments from all firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit requirement shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Dated: February 16, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-4256 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

Foreign-Trade Zones Board

[Docket No. 26-88]

Foreign-Trade Zone 49—Newark/Elizabeth, NJ; Withdrawal of Request for Subzone Status for Agfa-Gevaert, Inc.

Notice is hereby given of the withdrawal of the application submitted by the Port Authority of New York and New Jersey, grantee of FTZ 49, requesting authority for subzone status for Agfa-Gevaert, Inc. The application was filed on July 28, 1988 (53 FR 29754, 8/8/88).

The withdrawal is requested by the applicant because of changed circumstances.

The case has been withdrawn without prejudice, and FTZ Board Docket 26-88 is closed.

Dated: February 20, 1990.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 90-4260 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

International Trade Administration

[A-588-087]

Portable Electric Typewriters From Japan; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Review.

SUMMARY: On November 13, 1989, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on portable electric typewriters from Japan. The review covers one manufacturer/exporter of this merchandise to the United States and the period from May 1, 1982 through February 28, 1983. We preliminarily found a *de minimis* dumping margin of .0004 percent.

We gave interested parties an opportunity to comment on the preliminary results. We received no comments, and our final results are unchanged from those presented in our preliminary results of review.

EFFECTIVE DATES: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Kathleen Kelleher or Maureen Flannery, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2923.

SUPPLEMENTARY INFORMATION:

Background

On November 13, 1989, the Department of Commerce ("the Department") published in the **Federal Register** (54 FR 47249) the preliminary results of its administrative review of the antidumping duty order on portable electric typewriters from Japan (45 FR 30618, May 9, 1980). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of non-automatic portable electric typewriters from Japan that do not incorporate a calculating mechanism, in accordance with the scope determination made in the final results of the administrative review of the antidumping duty order for the May 1, 1981 through April 30, 1982 period (52 FR 1504, January 14, 1987). During the review period, such merchandise was classifiable under items 676.0510 and 676.0540 of the Tariff Schedules of the United States Annotated ("TSUSA"). This merchandise is currently classifiable under Harmonized Tariff Schedule ("HTS") item numbers 8469.21, 8469.29, 8469.31, and 8469.39. The TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers one manufacturer/exporter of Japanese portable electric typewriters and the period May 1, 1982 through February 28, 1983.

Final Results of the Review

We invited interested parties to comment on the preliminary results. We received no comments. The final margin is the same as that presented in the preliminary results of review. We determine that the following *de minimis* margin exists:

Manufacturer/exporter	Time period	Margin (percent)
Tokyo Juki Industrial Co., Ltd.	05/01/82-02/28/83	.0004

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service.

Further, as provided for in section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties of 2.40 percent shall be required for shipments by Tokyo Juki Industrial Co., Ltd. This rate is based on the final results of the last administrative review (53 FR 40926, October 19, 1988), which covered May 1, 1985 through April 30, 1986 sales by Tokyo Juki. For any shipments of this merchandise manufactured or exported by the remaining known manufacturers and/or exporters not covered in this review, the cash deposit will continue to be at the rate published in the final results of the last administrative review for each of those firms.

For any future entries of this merchandise from a new exporter, not covered in this or prior administrative reviews, whose first shipments occurred after April 30, 1986, and who is unrelated to Tokyo Juki or any previously reviewed firm, the cash deposit of 8.65 percent established as the rate for new exporters in the final results of the last review shall remain in effect.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675a(1)) and 19 CFR 353.22.

Dated: February 15, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90-4249 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

[A-427-001]

Sorbitol From France; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Review.

SUMMARY: On November 6, 1989, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on sorbitol from France. The review covers the one known manufacturer/exporter of this merchandise to the United States and the period April 1, 1987 through March 31, 1988.

We invited interested parties to comment on our preliminary results. We received no comments. Based on our analysis, the final results are the same as those presented in the preliminary results of review.

EFFECTIVE DATES: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Robin Gray or John Kugelman, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377-3601.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 1989, the Department of Commerce (the Department) published in the **Federal Register** (54 FR 46639) the preliminary results of its administrative review of the antidumping duty order on sorbitol from France (47 FR 15391, April 9, 1982). The Department has completed that administrative review in accordance with section 751 of the Tariff Act of 1930 (the Tariff Act).

Scope of the Review

The United States has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the *Harmonized Tariff Schedule* (HTS), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s).

Imports covered by the review are shipments of French crystalline sorbitol. Crystalline sorbitol is a polyol produced by the catalytic hydrogenation of surgars (glucose). It is used in the production of sugarless gum, candy, groceries, and pharmaceuticals. Such merchandise is currently classifiable under HTS item number 2905.44.00. The review covers the one known French manufacturer/exporter of crystalline sorbitol to the United States, Roquette Freres, and the period April 1, 1987 through March 31, 1988.

Final Results of Review

We invited interested parties to comment on the preliminary results. We received no comments. Based on our analysis, the final results are the same as those presented in our preliminary results of review, and we determine the margin to be:

Manufacturer/ Exporter	Period	Margin (percent)
Roquette Freres	4/1/87-3/31/88	0.94

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service. Individual differences between United States price and foreign market value may vary from the percentage stated above.

Further, as provided for by section 751(a) of the Tariff Act, a cash deposit of estimated antidumping duties of 0.94 percent shall be required.

For any future entries of this merchandise from a new exporter not covered in this or prior administrative reviews, whose first shipments occurred after March 31, 1987, and who is unrelated to the reviewed firm or any previously reviewed firm, a cash deposit of 0.94 percent shall be required. This deposit requirement is effective for all shipments of French sorbitol entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice.

This administrative review and notice are in accordance with section 751(a) (1) of the Tariff Act (19 U.S.C. 1675(a) (1) and 19 CFR 353.22.

Dated: February 13, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90-4250 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

[A-570-601]

Tapered Roller Bearings From the People's Republic of China; Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order in Accordance With Decision Upon Remand

AGENCY: International Trade Administration/Import Administration, Commerce

ACTION: Notice.

SUMMARY: On October 18, 1988, the United States Court of International Trade (CIT) ordered the Department of Commerce (Commerce) to correct certain computational errors in its final antidumping duty determination on tapered roller bearings from the People's Republic of China. *Timken Company* v. *United States*, Court No. 87-06-00738, Slip Op. 88-140 (October 18, 1988). Commerce filed the required remand results with the CIT on February 15, 1989. On March 22, 1989, the CIT affirmed, in its entirety, the remand determination by Commerce. *Timken Company* v. *United States*, Slip Op. 89-37 (March 22, 1989). The CIT's decision was appealed to the Court of Appeals for the Federal Circuit (CAFC) on May 22, 1989. The CAFC upheld the CIT's decision affirming Commerce's recalculation in *Timken Company* v. *United States*, Slip Op. 89-1490 (January 19, 1990).

Commerce will direct the U.S. Customs Service to continue the suspension of liquidation of all entries of the subject merchandise produced by China National Machinery & Equipment Import & Export Corporation (CMEC), which are entered, or withdrawn from warehouse, for consumption on or after May 11, 1989. For all entries on or after the date of publication of this notice, Commerce will direct Customs to require a cash deposit for each entry in an amount equal to the estimated dumping margin as described in the "Suspension of Liquidation section of this notice.

EFFECTIVE DATES: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Michael Ready, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2613.

SUPPLEMENTARY INFORMATION:

Background

On May 27, 1987, Commerce published a notice of "Final Determination of Sales at Less Than Fair Value" in the case of tapered roller bearings from the People's Republic of China. The notice stated that a margin of 0.97 percent was found for the respondent Premier, with no margin for the other respondent, CMEC.

A lawsuit was filed by counsel for the petitioner, alleging that Commerce's determination was unlawful, in part, because it contained certain computational and clerical errors that affected the dumping margin for CMEC. On October 18, 1988, the CIT remanded the final determination to Commerce for correction of these errors and for a redetermination of the dumping margins, if necessary. On February 15, 1989, Commerce issued remand results that amended the final determination on tapered roller bearings from the People's Republic of China. Based on its recalculation of the dumping margins, Commerce determined that CMEC's sales were at less than fair value during the period of investigation. These remand results were affirmed by the CIT, in their entirety, as a result of a ruling issued by it on March 22, 1989. *Timken Company* v. *United States*, Slip Op. 89-37 (March 22, 1989). CMEC appealed the CIT's decision to the Court of Appeals for the Federal Circuit (CAFC), contending that the CIT erred in concluding that the original Commerce determination was not supported by substantial evidence. Timken filed an application for a temporary restraining order (TRO), which was granted on May 11, 1989, enjoining Commerce from liquidating entries of any tapered roller bearings from the PRC other than those exported by Premier Bearing and Equipment Company, entered or withdrawn from warehouse for consumption. The CIT ordered the TRO be dissolved upon the publication of the CIT's March 22, 1989 decision. On January 19, 1990, the CAFC issued a final decision that the CIT was correct in remanding to Commerce for a new determination, and affirmed Commerce's recalculation after remand. *Timken Company* v. *United States*, Slip Op. 89-1490 (January 19, 1990).

Suspension of Liquidation

We are directing the Customs Service to continue the suspension of liquidation of all entries of tapered roller bearings from the People's Republic of China produced by CMEC, which were entered, or withdrawn from warehouse, for consumption on or after May 11, 1989. For all entries on or after the date of publication of this notice, we are directing Customs to require a cash deposit for each entry in an amount equal to the estimated weighted-average amount by which the foreign market value of the merchandise subject to the redetermination exceeds the United States price. We are further instructing Customs to collect a cash deposit for "All others" at a rate of 2.96%. The suspension of liquidation will remain in effect until further notice. For purposes of requesting a review pursuant to § 353.22(a) of the Commerce Regulations, 19 CFR 353.22(a), the anniversary month for CMEC will be June, the anniversary month of the publication of the original antidumping duty order.

The weighted-average margins are as follows:

Manufacturers/sellers/exporters	Weighted-average margin percentage
Premier Bearing & Equipment, Ltd	0.97
China National Machinery & Equipment Import & Export Corp	4.69
All Others	2.96

Dated: February 16, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-4257 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-05-M

[C-301-401 and C-549-401]

Certain Textile Mill Products and Apparel From Colombia and Certain Textile Mill Products From, Thailand; Intent To Terminate Suspended Investigations

AGENCY: International Trade Administration/Import Administration, Commerce.

ACTION: Notice of intent to terminate suspended investigations.

SUMMARY: The Department of Commerce is notifying the public of its intent to terminate the suspended countervailing duty investigations on certain textile mill products and apparel from Colombia and certain textile mill products from Thailand. Interested parties who object to these terminations must submit their comments in writing not later than March 31, 1990.

EFFECTIVE DATE: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Robert Bolling, David Hardy, or Linda Pasden, Office of Agreements Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-3793.

SUPPLEMENTARY INFORMATION:

Background

On March 12, 1985, the Department of Commerce ("the Department") published two agreements suspending the countervailing duty investigations on certain textile mill products and apparel from Colombia (50 FR 9863) and certain textile mill products from Thailand (50 FR 9832). The Department has not received a request to conduct an administrative review of the agreement suspending the countervailing duty investigations on certain textile mill products and apparel from Colombia and certain textile mill products from Thailand for four consecutive annual anniversary months. This is the fifth anniversary.

The Department may terminate a suspended investigation if the Secretary of Commerce concludes that a suspension agreement is no longer of interest to interested parties. Accordingly, as required by § 355.25(d)(4) of the Commerce Department's regulations published in the **Federal Register** of December 27, 1988 (53 FR 52358). The Department is notifying the public of its intent to terminate these suspended investigations.

Opportunity to Object

Not later than March 31, 1990, interested parties, as defined in § 355.2(i) of the Department's regulations, may object to the Department's intent to terminate these suspended investigations. Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room B–099, U.S. Department of Commerce, Washington, DC 20230.

If interested parties do not request an administrative review or object to the Department's intent to terminate by March 31, 1990, we shall conclude that the suspended investigations are no longer of interest to interested parties and shall proceed with the terminations.

This notice is in accordance with 19 CFR 355.25(d)(4) and § 355.25(d)(4).

Dated: February 15, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90–4251 Filed 2–23–90; 8:45 am]

BILLING CODE 3510-DS-M

Short Supply Determination; Certain Hot-Rolled Carbon Steel

AGENCY: Import Administration/ International Trade Administration, Commerce.

ACTION: Notice of Short-Supply Determination: Certain Hot-Rolled Carbon Steel Special Sections Under 3 Inches in Cross-Sectional Dimension.

SHORT SUPPLY REVIEW NUMBER: 2.

SUMMARY: Pursuant to section 4(b)(4)(A) of the Steel Trade Liberalization Program Implementation Act, Pub. L. No. 101–221, 103 Stat. 1886 (1989) ("the Act"), and § 357.102 of the Department of Commerce's Short-Supply Regulations, published in the **Federal Register** on January 12, 1990, 55 Fed. Reg. 1348 ("Commerce's Short-Supply Regulations"), the Secretary of Commerce ("Secretary") hereby determines that certain hot-rolled carbon steel special sections under 3 inches in cross-sectional dimension, referred to as 1000M4 sections, are in short supply in the U.S. market during the first six months of 1990. On January 18, 1990, the Secretary received an adequate short supply petition from Hope's Architectural Products ("Hope's" requesting a short-supply allowance for 100 net tons of this product. Potential domestic suppliers of the requested sections indicated they were either unwilling to offer this material to Hope's during the required time frame or they cannot meet the necessary specifications. In accordance with § 357.102(a) of Commerce's Short-Supply Regulations, the Secretary hereby grants Hope's a short-supply allowance for this entire tonnage.

EFFECTIVE DATES: February 15, 1990.

FOR FURTHER INFORMATION CONTACT: Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230 (202) 377–0159.

SUPPLEMENTARY INFORMATION: On January 18, 1990, the Secretary received an adequate short-supply petition from Hope's requesting a short-supply allowance for 100 net tons of custom-rolled special sections under 3 inches in cross-sectional dimension (i.e., small-bar shapes) referred to as 1000M4 sections. The 1000M4 section has a cross-sectional profile like that of a "T" on a pedestal. The top of the "T" measures 2.188 inches across and the pedestal 0.688 inches across. The overall depth of the section is 1.312 inches and it weighs 2.1428 pounds per foot of length.

These sections will be used by Hope's to manufacture steel windows for prisons and other public buildings. The request was made under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community, and the Government of the United States of America Concerning Trade in Certain Steel Products. Hope's petition alleges that no mill in the United States is capable of meeting the required specifications for the 1000M4 sections and that the qualified foreign mill for this material does not have sufficient available quota to supply this order.

Hope's claimed that 1000M4 sections were not produced domestically and requested the Secretary to determine within 15 days whether this product is in short supply, in accordance with Commerce's Short-Supply Regulations. However, the Secretary determined that Hope's request did not warrant a decision under the 15-day fast-track procedure because the capability to produce the subject product did exist domestically.

ACTION: On January 18, 1990, the Secretary established an official record on this short-supply request (Case Number 2) in the Central Records Unit, Room B–099, Import Administration, U.S. Department of Commerce at the above address. On January 30, 1990, the Secretary published a notice in the **Federal Register** announcing its review of this request and soliciting comments from interested parties. Comments were required to be received no later than February 7, 1990, and interested parties were invited to file replies to any comments not later than February 12, 1990. In order to determine whether this product could be supplied to Hope's during 1990, the Secretary sent questionnaires to Structural Metals Inc. (SMI), Bethlehem Steel Corporation (Bethlehem), Plymouth Tube Company (Plymouth), Steel of West Virginia (SWV), McDonald Steel Corporation (McDonald), and Rathbone Precision Metals Inc. (Rathbone). The Secretary received questionnaire responses from Bethlehem, McDonald, SWV, and Rathbone and no comments to the **Federal Register** notice.

QUESTIONNAIRE RESPONSES: Bethlehem indicated that although it has, in the past, produced sections similar to those required by Hope's, it could not supply Hope's needs for the subject section due to the relatively short lead times for delivery required by Hope's, the long lead times required by Bethlehem to develop the rolls and become qualified with Hope's, the small quantities involved, and the high per-ton costs associated with distributing the costs of rolls and qualification over small quantities.

McDonald indicated that they were contacted by Hope's in late 1988 about supplying 1000M4 sections but declined

to quote because the size and shape of the subject section was not within the size range of McDonald's mills. This situation has not changed and McDonald has stated that it is not willing or able to supply Hope's with the requested product.

Both Rathbone and SWV indicated that they currently are not manufacturing the subject section, have not made this section in the past, do not possess the capability to produce it, and are not interested in supplying Hope's current request.

CONCLUSION: The potential domestic suppliers of 1000M4 sections are either unwilling to offer this material to Hope's during the required time frame or they cannot meet the necessary specifications. Furthermore, sufficient quota for this steel section is unavailable to the foreign supplier. Therefore, the Secretary determines that short-supply exists with respect to the requested product. Pursuant to section 4(b)(4)(A) of the Act, and § 357.102 of Commerce's Short-Supply Regulations, the Secretary grants Hope's a short-supply allowance for 100 net tons of the requested sections for the first half of 1990.

Dated: February 15, 1990.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 90-4252 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

[A-331-602]

Certain Fresh Cut Flowers From Ecuador; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On November 13, 1989, the Department of Commerce published the preliminary results of its administrative review of the antidumping duty order on certain fresh cut flowers from Ecuador. The review covers four producers/exporters and the period November 3, 1986 through February 29, 1988.

We gave interested parties an opportunity to comment on our preliminary results. We received no comments. The final results are unchanged from those presented in the preliminary results of review.

EFFECTIVE DATE: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Joseph A. Fargo or Laurie A. Lucksinger, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-5253.

SUPPLEMENTARY INFORMATION:

Background

On November 13, 1989, the Department of Commerce ("the Department") published in the **Federal Register** (54 FR 47247) the preliminary results of its administrative review of the antidumping duty order on certain fresh cut flowers from Ecuador (52 FR 8494, March 18, 1987). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of the Review

Imports covered by the review are shipments of certain fresh cut flowers from Ecuador. During the review period such merchandise was classifiable under item 192.17.00 of the Tariff Schedules of the United States Annotated ("TSUSA"). This merchandise is currently classifiable under Harmonized Tariff System ("HTS") item 0603.10.30. The TSUSA and HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive. The review covers four producers/exporters and the period November 3, 1986 through February 29, 1988.

Final Results of Review

We invited interested parties to comment on the preliminary results. We received no comments. The final results are unchanged from those presented in the preliminary results of review, and we determine that the following margins exist for the period November 3, 1986 through February 29, 1988:

Producer/exporter	Margin (percent)
Eden Flowers	23.5
Florisol Cia Ltda	0
Inverflora	23.5
Terraflor	23.5

The Department will instruct the Customs Service to assess antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, as provided for in section 751(a)(1) of the Tariff Act, a cash deposit of estimated antidumping duties based on the above margins shall be required for shipments of certain fresh cut flowers from Ecuador by these firms. For any future entries of this merchandise from a new exporter, not covered in this review, whose first shipments occurred after February 29, 1988 and who is unrelated to any reviewed firm, no cash deposit shall be required.

These cash deposit requirements are effective for all shipments of certain fresh cut flowers from Ecuador, entered or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)) and 19 CFR 353.22 (1989).

Dated: February 16, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-4255 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

[C-475-008]

Semifinished Forged Undercarriage Components From Italy; Revocation of Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of revocation of countervailing duty order.

SUMMARY: The Department of Commerce is revoking the countervailing duty order on semifinished forged undercarriage components from Italy because it is no longer of interest to interested parties.

EFFECTIVE DATE: January 1, 1990.

FOR FURTHER INFORMATION CONTACT: Gayle Longest or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On January 9, 1990, the Department of Commerce ("the Department") published in the **Federal Register** (55 FR 766) its intent to revoke the countervailing duty order on semifinished forged undercarriage components from Italy (49 FR 489; January 4, 1984). Interested parties who objected to the revocation were provided the opportunity to submit their comments on or before January 31, 1990. Additionally, as required by § 355.25(d)(4)(ii) of the Department's regulations, the Department served

written notice of its intent to revoke this order on each interested party listed on the service list. On January 24, 1990, the Department published a notice of opportunity to request administrative review in this proceeding (54 FR 992) for the period January 1, 1989 through December 31, 1989.

Scope of Order

The United States, under the auspices of the Customs Cooperation Council, has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the *Harmonized Tariff Schedule* ("HTS"), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item numbers.

Imports covered by this order are shipments of semifinished forged undercarriage links and rollers for crawler-mounted machinery (forged undercarriage components). Through 1988, such merchandise was classifiable under item numbers 664.08, 692.34 and 692.35 of the *Tariff Schedules of the United States Annotated.* This merchandise is currently classifiable under HTS item numbers 8431.49.90, 8708.99.10, and 8708.99.20. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Determination to Revoke

The Department may revoke an order if the Secretary of Commerce concludes that an order is no longer of interest to interested parties. We received no objections to our intent to revoke the countervailing duty order on semifinished forged undercarriage components from Italy and have not received a request to conduct an administrative review of the order for the past five consecutive annual anniversary months.

Based on the absence of both objections to the revocation of this order and requests for administrative reviews by interested parties, the Department has concluded that the order is no longer of interest to interested parties. Therefore, we are revoking the countervailing duty order on semifinished forged undercarriage components from Italy in accordance with § 355.25(d)(4) of the Department's regulations. The effective date of this revocation is January 1, 1990.

Further, as required by § 355.25(d)(5) of the Department's regulations, the Department is terminating the suspension of liquidation and will instruct the Customs Service to liquidate, without regard to countervailing duties, all unliquidated entries of this merchandise exported from Italy on or after January 1, 1990.

This notice is in accordance with 19 CFR 355.25(d)(3)(vii) and 355.25(d)(5).

Dated: February 16, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-4258 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

[C-614-503]

Lamb Meat From New Zealand; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative review.

SUMMARY: The Department of Commerce has conducted an administrative review of the countervailing duty order on lamb meat from New Zealand. We preliminarily determine the total bounty or grant to be 26.01 percent *ad valorem* for Taumaranui and 2.84 percent *ad valorem* for all other firms during the period April 1, 1987 through March 31, 1988. We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: February 26, 1990.

FOR FURTHER INFORMATION CONTACT: Gayle Longest or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

SUPPLEMENTARY INFORMATION:

Background

On May 8, 1989, the Department of Commerce ("the Department") published in the **Federal Register** (54 FR 19590) the final results of its last administrative review of the countervailing duty order on lamb meat from New Zealand (50 FR 37708; September 17, 1985). On September 14, 1988, the New Zealand Meat Producers Board requested an administrative review of the order. We initiated the administrative review on December 5, 1988 (53 FR 48951). The Department has now conducted this administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

Scope of Review

Imports covered by this review are shipments of lamb meat, other than prepared, preserved or processed, from New Zealand. During the review period, such merchandise was classifiable under item number 106.3000 of the *Tariff Schedules of the United States Annotated.* This merchandise is currently classifiable under item numbers 0204.10.0000, 0204.22.2000, 0204.23.2000, 0204.30.0000, 0204.42.2000 and 0204.43.2000 of the *Harminized Tariff Schedule* (HTS). The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers the period April 1, 1987 through March 31, 1988 and four programs.

Analysis of Programs

(1) Export Market Development Taxation Incentive (EMDTI)

Under the EMDTI, established in the 1979 Amendment to the Income Tax Act of 1976, exporters may receive tax credits for a certain percentage of their export market development expenditures. Qualifying expenditures include those incurred principally for seeking and developing new markets, retaining existing markets and obtaining market information. An exporter who takes advantage of this tax credit may not deduct the qualifying expenditures as ordinary business expenses in calculating taxable income. The tax credit for tax returns filed during the review period was 64 percent to the total qualifying expenditures, and the normal corporate tax rate in New Zealand was 48 percent. Because the program is limited to exporters, we preliminaril determine that it confers an export bounty or grant. Five exporters claimed EMDTI tax credits for lamb meat exports to the United States on their tax returns filed during the review period.

Since exporters may claim a tax credit equal to 64 percent of the qualifying expenditures but may not deduct these expenditures from income, which is taxable at 48 percent, the net benefit to the exporters is 16 percent of the qualifying expenditures. To calculate the benefit, we took 16 percent of each exporter's qualifying expenditures relating to lamb meat exports to the United States and allocated that amount over its total sales to lamb meat exports to the United States during the review period. We then weight-averaged the

resulting benefits by each company's proportion of total lamb meat exports to the United States during the review period. On this basis, we preliminarily determine the benefit from this program to be 25.34 percent *ad valorem* for Taumaranui and 2.17 percent *ad valorem* for all other firms.

For the fiscal year commencing April 1, 1988, the New Zealand government reduced the corporate tax rate to 28 percent. In addition, for the fiscal year ending March 31, 1989, it decreased the tax credit rate to 42 percent. Consequently, the net benefit to exporters is 14 percent of qualifying expenditures relating to lamb meat exports. Therefore, for purposes of cash deposits of estimated countervailing duties, we preliminarily determine the benefit from this program to be 22.17 percent *ad valorem* for Taumaranui and 1.90 percent *ad valorem* for all other firms.

(2) Livestock Incentive Scheme

The Livestock Incentive Scheme was introduced in 1976 and is administered by the Rural Banking and Finance Corporation. The program was set up to encourage farmers to increase permanently their number of livestock. Under the scheme, a farmer engaged in a stock increase program, for a minimum of one and a maximum of three years, may opt for one of two incentives: (1) an interest/free suspensory loan of NZ$12 for each additional stock unit carried; or (2) a deduction of NZ$24 from taxable income for each additional stock unit carried. If the livestock increase was met, farmers who elected to take out loans wrote the loans off as tax-free grants. For farmers electing the tax option, the provisional tax deduction could be applied toward tax liability in any of the three years after completion of the development program.

Because benefits under this program are available only to farmers with livestock herds, we preliminarily determine that it is limited to a specific enterprise or industry, or group of enterprises or industries, and therefore confers a bounty or grant.

To calculate the benefit received from the loan option portion of the program, we treated the loan amounts forgiven as grants and allocated those benefits over five years, the average useful life of breeding stock. The discount rate chosen was the average interest rate on overdrafts during the review period. For the loans that have not yet been forgiven, we treated the loan amounts as one-year, interest-free loans and measured the benefit using the interest rate described above as our benchmark. The benefit from the tax option was determined by multiplying the amount of the tax deduction used during the review period by the corporate tax rate. We added the value of the benefits from the loan and tax portions of the program and multiplied the result by a factor determined to represent the value of lamb as a percentage of total livestock production. We then divided that result by the total value of lamb products sold during the review period. On this basis, we preliminarily determine the benefit from the program to be 0.67 percent *ad valorem* for all firms.

(3) Other Programs

We also examined the following programs and preliminarily determine that exporters of lamb meat did not use them during the review period:

a. Meat Producers Board Price Support Scheme; and

b. Export Performance Taxation Incentive (EPTI).

Preliminary Results of Review

As a result of our review, we preliminarily determine the total bounty or grant during the period April 1, 1987, through March 31, 1988, to be 26.01 percent *ad valorem* for Taumaranui and 2.84 percent *ad valorem* for all other firms.

Therefore, the Department intends to instruct the Customs Service to assess countervailing duties of 26.01 percent of the f.o.b. invoice price on shipments from Taumaranui and 2.84 percent of the f.o.b. invoice price on shipments from all other firms exported on or after April 1, 1987, and on or before March 31, 1988.

The Departmemt also intends to instruct the Customs Service to collect a cash deposit of estimated countervailing duties of 22.84 percent of the f.o.b. invoice price on shipments from Taumaranui and 2.57 percent of the f.o.b. invoice price on shipments from all other firms entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

Parties to the proceeding may request disclosure of the calculations methodology and interested parties may request a hearing not later than 10 days after the date of publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Any hearing, if requested, will be held seven days after the scheduled date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 355.38(e). Any request for disclosure under an administrative protective order must be made no later than five days after the date of publication. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Dated: February 16, 1990.

Francis J. Sailer,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90-4259 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-DS-M

Short Supply Determinations; Coater Blade Steel

AGENCY: Import Administration/ International Trade Administration, Commerce.

ACTION: Notice of short-supply review and request for comments: certain coater blade steel.

SHORT-SUPPLY REVIEW NUMBER: 9.

SUMMARY: Pursuant to section 4(b)(3)(B) of the Steel Trade Liberalization Program Implementation Act, Pub. L. No. 101-221, 103 Stat. 1886 (1989) ("the Act"), and § 357.104(b) of the Department of Commerce's Short-Supply Regulations, published in the **Federal Register** on January 22, 1990, 55 FR 1348 ("Commerce's Short-Supply Regulations"), the Secretary of Commerce ("Secretary") hereby announces that a short-supply determination is under review with respect to certain coater blade steel. On February 21, 1990, Vogelsang Corporation submitted an adequate petition to the Secretary requesting a short-supply allowance for 120 metric tons of this product under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community and the Government of the United States of America Concerning Trade in Certain Steel Products.

The requested product meets the following specifications:

Width range: 2.5–4.25 inches;
Thickness range: 0.012–0.050 inch;
Straightness deviation: Maximum of 0.024 inch/10 feet of length;
Flatness: Extra accurate, with maximum deviation of 0.0025 inch/inch of width;

Other specifications: High wear resistance, edge finish without notches, no surface defects, hardened and tempered, narrow tensile strength tolerances with maximum deviation of ±7 KSI.

Section 4(b)(B)(i) of the Act and § 357.106(b)(1) of Commerce's Short-Supply Regulations require the Secretary to make a determination with respect to a short-supply petition not later than the 15th day after the petition is filed if the Secretary finds that one of the following conditions exist: (1) The raw steelmaking capacity utilization in the United States equals or exceeds 90 pecent; (2) the importation of additional quantities of the requested steel product was authorized by the Secretary during each of the two immediately preceding years; or (3) the requested steel product is not produced in the United States. The Secretary finds that the importation of additional quantities of the requested steel product was authorized during each of the two immediately preceding years. Therefore, in accordance with section 4(b)(4)(B)(i)(II) of the Act and § 357.106(b)(1)(ii) of Commerce's Short-Supply Regulations, the Secretary is applying a rebuttable presumption that this product is presently in short supply. Unless domestic steel producers provide comments in response to this notice proving that they can and will produce and supply the requested quantity of this product within the desired period of time, provided it represents a normal order-to-delivery period, the Secretary will issue a short-supply allowance not later than March 8, 1990.

Comments: Interested parties wishing to comment on this review must send written comments not later than March 5, 1990, to the Secretary of Commerce, Attention: Import Administration, room 7866, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street NW., Washington, DC 20230. All documents submitted to the Secretary shall be accompanied by four copies. Interested parties shall certify that the factual information contained in any submission they make is accurate and complete to the best of their knowledge.

Any person who submits information in connection with a short-supply review may designate that information, or any part thereof, as proprietary, thereby requesting that the Secretary treat that information as proprietary. Information that the Secretary designates as proprietary will not be disclosed to any person (other than officers or employees of the United States Government who are directly concerned with the short-supply determination) without the consent of the submitter unless disclosure is ordered by a court of competent jurisdiction. Each submission of proprietary information shall be accompanied by a full public summary or approximated presentation of all proprietary information which will be placed in the public record. All comments concerning this review must reference the above noted short-supply review number.

FOR FURTHER INFORMATION CONTACT: Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, room 7866, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230, (202) 377–0159.

Dated: February 21, 1990.

Lisa B. Barry,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90–4382 Filed 2–23–90; 8:45 am]

BILLING CODE 3510–DS–M

Short Supply Determinations: Rotogravure Doctor Blade Steel

AGENCY: Import Administration/ International Trade Administration, Commerce.

ACTION: Notice of short-supply review and request for comments: certain rotogravure doctor blade steel.

SHORT-SUPPLY REVIEW NUMBER: 10.

SUMMARY: Pursuant to section 4(b)(3)(B) of the Steel Trade Liberalization Program Implementation Act, Pub. L. No. 101–221, 103 Stat. 1886 (1989) ("the Act"), and § 357.104(b) of the Department of Commerce's Short-Supply Regulations, published in the **Federal Register** on January 12, 1990, 55 FR 1348 ("Commerce's Short-Supply Regulations"), the Secretary of Commerce ("Secretary") hereby announces that a short-supply determination is under review with respect to certain rotogravure doctor blade steel. On February 21, 1990, Vogelsang Corporation submitted an adequate petition to the Secretary requesting a short-supply allowance for 23 metric tons of this product under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community and the Government of the United States of America Concerning Trade in Certain Steel Products.

The requested product meets the following specifications:

Chemistry (weight percentage nominal): Carbon: 1.0, Silicon 0.20, Manganese 0.40, Phosphorus 0.010 max, Sulphur 0.004 max;

Width range (and tolerances): 50–180 mm (<20 mm, ± 0.07mm; 20–<50 mm, ± 0.10 mm; 50–<125/mm, ± 0.15/mm);

Thickness range (and tolerances): 0.08–0.25 mm (0.08–0.124 mm, ± 0.005 mm; 0.125–0.159 mm, ± 0.006 mm; 0.160–0.199 mm, ± 0.007 mm; 0.200–0.249 mm, ± 0.008 mm; 0.25 mm, ± 0.009 mm)

Surface: bright fine polished, surface roughness Rmax <2.5 mm, Ra <0.25 μmeter (m);

Straightness: <0.3mm/3m;

Flatness (and tolerances): extra accurate, with tolerances as follows:

Thickness mm	Unflatness across and lengthwise percentage of the width
–0.09	0.40
0.10 to 0.14	0.35
0.15 to 0.19	0.30
0.20 to 0.25	0.25

Tensile strenth: 286 ± KSI;

Hardness: 585 HV nom;

Edges: deburred;

Section 4(b)(4)(B)(i) of the Act and § 357.106(b)(1) of Commerce's Short-Supply Regulations require the Secretary to make a determination with respect to a short-supply petition not later than the 15th day after the petition is filed if the Secretary finds that one of the following conditions exist: (1) The raw steelmaking capacity utilization in the United States equals or exceed 90 percent; (2) the importation of additional quantities of the requested steel product was authorized by the Secretary during each of the two immediately preceding years; or (3) the requested steel product is not produced in the United States. The Secretary finds that the importation of additional quantities of the requested steel product was authorized during each of the two immediately preceding years. Therefore, in accordance with section 4(b)(4)(B)(i)(II) of the Act and § 357.106(b)(1)(ii) of Commerce's Short-Supply Regulations, the Secretary is applying a rebuttable presumption that this product is presently in short supply. Unless domestic steel producers provide comments in response to this notice proving that they can and will produce and supply the requested quantity of this product within the desired period of time, provided it represents a normal order-to-delivery period, the Secretary will issue a short-supply allowance not later than March 8, 1990.

Comments: Interested parties wishing to comment on this review must send written comments not later than March 5, 1990, to the Secretary of Commerce, Attention: Import Administration, room 7866, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230. All documents submitted to the Secretary shall be accompanied by four copies. Interested parties shall certify that the factual information contained in any submission they make is accurate and complete to the best of their knowledge.

Any person who submits information in connection with a short-supply review may designate that information, or any part thereof, as proprietary, thereby requesting that the Secretary treat that information as proprietary. Information that the Secretary deisgnates as proprietary will not be disclosed to any person (other than officers or employees of the United States Government who are directly concerned with the short-supply determination) without the consent of the submitter unless disclosure is ordered by a court of competent jurisdiction. Each submission of proprietary information shall be accompanied by a full public summary or approximated presentation of all proprietary information which will be placed in the public record. All comments concerning this review must reference the above noted short-supply review number.

FOR FURTHER INFORMATION CONTACT: Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, room 7866, Pennsylvania Avenue and 14th Street NW., Washington, DC 20230, (202) 377–0159.

Dated: February 21, 1990.

Lisa B. Barry,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90–4383 Filed 2–23–90; 8:45 am]

BILLING CODE 3510–DS–M

Short Supply Determinations: T–4 Feeler Gauge Steel

AGENCY: Import Administration/ International Trade Administration, Commerce

ACTION: Notice of short-supply review and request for comments: certain T–4 feeler gauge steel.

SHORT-SUPPLY REVIEW NUMBER: 8.

NOTICE: Pursuant to section 4(b)(3)(B) of the Steel Trade Liberalization Program Implementation Act, Pub. L. No. 101–221, 103 Stat. 1886 (1989) ("the Act"), and 357.104(b) of the Department of Commerce's Short-Supply Regulations, published in the **Federal Register** on January 12, 1990, 55 FR 1348 ("Commerce's Short-Supply Regulations"), the Secretary of Commerce ("Secretary") hereby announces that a short-supply determination is under review with respect to certain T–4 feeler gauge steel. On February 21, 1990, Vogelsang Corporation submitted an adequate petition to the Secretary requesting a short-supply allowance for 48 metric tons of this product under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community, and the Government of the United States of America Concerning Trade in Certain Steel Products.

The requested product meets the following specifications:

Chemical Composition: (percent nominal) Carbon: 1.00, Silicon: 0.30, Manganese: 0.40, Phosphorus (Max): 0.20, Sulfur (Max): 0.15, Chromium: 0.15;
Width: 0.250 and 0.500 inch;
Thickness: 0.001–0.040 inch;
Thickness Tolerances: T–4 Feeler Gauge Thickness Tolerances (in inches)

Thickness	Plus/ Minus
0.001 to 0.0015	0.00006
0.002	0.00008
0.0025 to 0.004	0.00012
0.005 to 0.009	0.00016
0.010 to 0.012	0.00020
0.013 to 0.019	0.00024
0.020 to 0.024	0.00028
0.025 to 0.031	0.00031
0.032 to 0.039	0.00035
0.040 to 0.049	0.00047

Hardness: 48–52 on the Rockwell "C" scale;
Flatness: 0.2 percent per inch;
Elongation: A10, 7–10 percent;
Other specifications: bright polished, hardened and tempered, #1 or #3 edge, delivered in coil.

Section 4(b)(4)(B)(i) of the Act and § 357.106(b)(1) of Commerce's Short-Supply Regulations require the Secretary to make a determination with respect to a short-supply petition not later than the 15th day after the petition is filed if the Secretary finds that one of the following conditions exist: (1) the raw steelmaking capacity utilization in the United States equals or exceeds 90 percent; (2) the imporation of additional quantities of the requested steel product was authorized by the Secretary during each of the two immediately preceding years; or (3) the requested steel product is not produced in the United States. The Secretary finds that the importation of additional quantities of the requested steel product 0.250 inch in width was authorized during each of the two immediately preceding years, and, on the basis of available information, that the material 0.500 inch in width is not produced in the United States. Therefore, in accordance with sections 4(b)(4)(B)(i)(II) and (III) of the Act and §§ 357.106(b)(1)(ii) and (iii) of Commerce's Short-Supply Regulations, the Secretary is applying a rebuttable presumption that this product is presently in short supply. Unless domestic steel producers provide comments in response to this notice proving that they can and will produce and supply the requested quantity of this product within the desired period of time, provided it represents a normal order-to-delivery period, the Secretary will issue a short-supply allowance not later than March 8, 1990.

COMMENTS: Interested parties wishing to comment on this review must send written comments not later than March 5, 1990, to the Secretary of Commerce, Attention: Import Administration, room 7866, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street NW., Washington, DC 20230. All documents submitted to the Secretary shall be accompanied by four copies. Interested parties shall certify that the factual information contained in any submission they make is accurate and complete to the best of their knowledge.

Any person who submits information in connection with a short-supply review may designate that information, or any part thereof, as proprietary, thereby requesting that the Secretary treat that information as proprietary. Information that the Secretary designates as proprietary will not be disclosed to any person (other than officers or employees of the United States Government who are directly concerned with the short-supply determination) without the consent of the submitter unless disclosure is ordered by a court of competent jurisdiction. Each submission of proprietary information shall be accompanied by a full public summary or approximated presentation of all proprietary information which will be placed in the public record. All comments concerning this review must reference the above noted short-supply review number.

FOR FURTHER INFORMATION CONTACT: Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, room 7866, Pennsylvania

Avenue and 14th Street NW., Washington, DC 20230, (202) 377–0159.

Dated: February 21, 1990.

Lisa B. Barry,

Acting Assistant Secretary for Import Administration.

[FR Doc. 90–4384 Filed 2–23–90; 8:45 am]

BILLING CODE 3510-DS-M

National Oceanic and Atmospheric Administration

Endangered and Threatened Species; Recovery Planning Guidelines

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of availability and request for comments.

SUMMARY: NMFS has developed proposed recovery planning guidelines that will be used by the agency to develop and implement recovery plans under the Endangered Species Act of 1973 (ESA) and conservation plans under the Marine Mammal Protection Act of 1972 (MMPA). Comments are requested from the public.

DATES: Comments on the proposed guidelines must be received by April 27, 1990.

ADDRESSES: Comments should be sent to Dr. Nancy Foster, Director, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Copies of the proposed guidelines may be obtained from Patricia Montanio, Protected Species Management Division, Office of Protected Resources and Habitat Programs (301/427–2322).

SUPPLEMENTARY INFORMATION:

Background

Section 4(f) of the ESA requires the development and implementation of recovery plans for the conservation and survival of all endangered and threatened species, unless such a plan will not promote the conservation of the species. Each plan must include (1) a description of site-specific management actions necessary for recovery, (2) objective, measurable criteria which, when met, would result in the species being removed from the list of endangered and threatened species, and (3) estimates of the time and cost to carry out the recommended recovery measures. The public must be provided notice and an opportunity for comment prior to approval of a new or revised recovery plan. Section 4(h) of the Act requires the establishment of a system for developing and implementing recovery plans on a priority basis.

Section 115 of the Marine Mammal Protection Act (MMPA) requires the preparation of conservation plans for species or stocks designated as depleted for the purpose of conserving and restoring the species or stock to its optimum sustainable population. These plans are to be modeled on recovery plans required under the ESA, and should provide a clear strategy, including research needs, for the conservation and restoration of the species. Senate Report 100–592 specified that conservation plans should include (1) an assessment of the status of the species or stock and its essential habitat; (2) a description of the nature, magnitude, and causes of any population declines or loss of essential habitat; (3) an assessment of existing and possible threats to the species and its habitat; (4) a discussion of critical information gaps; (5) a description and discussion of research and management than could be undertaken to meet the objectives of the plan; and (6) a schedule for implementing the research and management actions identified in the plan.

The NMFS is responsible for promoting the recovery of most endangered and threatened marine species and depleted marine mammals. Recovery efforts include (1) assessing the status and trends of the species and identifying important habitats; (2) identifying the factors adversely affecting or impeding recovery of the species; and (3) taking actions to mitigate the factors adversely affecting the species or to otherwise promote the species conservation.

Recovery efforts must not only involve NMFS, but must include a coordinated effort by other Federal agencies, state and local governments, private industry, conservation organizations and the public. The development and implementation of recovery plans will help combine the programs and expertise of these agencies and organizations into effective recovery efforts.

Proposed Recovery Planning Guidelines

NMFS has developed proposed guidelines that provide a framework for developing and implementing coordinated recovery programs for endangered, threatened and depleted marine species under the jurisdiction of NMFS. These guidelines discuss the role of recovery teams, the content of recovery plans and monitoring and tracking of recovery actions. NMFS is soliciting comments on these guidelines from any interested party.

Proposed Priority Guidelines

As required by section 4(h) of the ESA, NMFS published proposed priority guidelines (May 30, 1989; 54 FR 22926) for developing recovery plans, implementing tasks in recovery plans and allocating resources. Once final, this priority system will be used by NMFS as a guide to set priorities for funding and performance of individual recovery tasks.

Dated: February 16, 1990.

Nancy Foster,

Director, Office of Protected Resources.

[FR Doc. 90–4233 Filed 2–23–90; 8:45 am]

BILLING CODE 3510-22-M

National Institute of Standards and Technology

Announcement of Workshop To Discuss Test Suite for FORTRAN Programming Language Standard (ANSI X3. 9–199X)

AGENCY: National Institute of Standard and Technlogy (NIST), Commerce.

ACTION: Notice.

SUMMARY: The National Computer System Laboratory (NCSL) at the NIST is sponsoring an open workshop to discuss plans for a test suite for the forthcoming American National Standard for FORTRAN Programming Language (ANSI X3.9–199X). The workshop will focus on NIST's test suite requirements for Federal Information Processing Standards, industry's plans for a test suite, and community interest in cooperating with NIST to extend the current FIPS 69–2, FORTRAN (FORTRAN 77) test suite for the forthcoming FORTRAN standard.

DATES: The workshop will be held March 9, 1990, at NIST, Gaithersburg, MD, in Lecture Room B, Administration Building, 9 to 4 p.m.

ADDRESS: To register, contact Dorothy Snyder, National Institute of Standards and Technology, Building 225, Room A–266, Gaithersburg, MD 20899, Telephone: (301) 975–3274.

FOR FURTHER INFORMATION CONTACT: Kathryn Miles (301) 975–3156 or L. Arnold Johnson (301) 975–3247.

SUPPLEMENTARY INFORMATION: Attendance at the workshop is limited due to space requirements and to the size of the conference facility; therefore, registration is on a first-come, first-served basis. Participants are expected to make their own travel arrangements and accommodations. NIST reserves the right to cancel the workshop.

Dated: February 20, 1990.

John W. Lyons,

Director.

[FR Doc. 90-4292 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-CN-M

Technology Administration

Announcement of Public Workshop on Issues Related to the Implementation of the Advanced Technology Program

AGENCY: Technology Administration, Commerce.

ACTION: Notice.

SUMMARY: The Technology Administration of the Department of Commerce announces a public workshop to be held on March 6, 1990 to seek ideas and suggestions from the public on two issues pertaining to implemenation of the Advanced Technology Program: (1) Potential Technological areas which might benefit from funding under the Program; and (2) how the private sector may best be involved in setting Program priorities. All interested parties are invited to attend.

DATES: The workshop will be held from 10 a.m. to 4 p.m. on March 6, 1990.

ADDRESSES: The Workshop will be held at the Department of Commerce in the auditorium of the Herbert C. Hoover Building, 14th Street and Constitution Avenue, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: George Uriano, A363 Physics Building, National Institute of Standards and Technology (301) 975-4500.

Dated: February 20, 1990.

Lee Mercer,

Deputy Under Secretary for Technology.

[FR Doc. 90-4261 Filed 2-23-90; 8:45 am]

BILLING CODE 3510-13-M

DEPARTMENT OF EDUCATION

[CFDA No.: 84.129]

Rehabilitation Long-Term Training; Notice Inviting Applications for New Awards Under the Rehabilitation Long-Term Training Program in the field of Rehabilitation Counseling for fiscal year (FY) 1990

Purpose of Program: This program provides support through grants to increase the supply of qualified rehabilitation personnel and to maintain and upgrade the skills and knowledge of personnel who provide vocational and independent living rehabilitation services.

Deadline for Transmittal of Applications: April 11, 1990.

Applications Available: February 26, 1990.

Estimated Available Funds: $150,000.

Estimated Range of Awards: $25,000 to $50,000.

Estimated Average Size of Awards: $37,500.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, and 85; and (b) The regulations for this program in 34 CFR parts 385 and 386.

Priority: The Secretary is particularly interested in applications that meet the following invitational priority:

There is a need for doctoral level rehabilitation personnel to replace the large number of individuals who are retiring from work in rehabilitation service delivery, administration, or academic settings. To assist in responding to this need, projects that are designed to train doctoral level rehabilitation personnel are encouraged. Projects may offer training through educational institutions with established graduate rehabilitation counseling programs that are accredited by the Council on Rehabilitation Education. Project funds could be used for the support of costs for tuition, fees, stipends, and other training allowances for students. Preference in the award of scholarships may be given to individuals who have academic degrees in rehabilitation counseling and work experience in the State and Federal vocational rehabilitation service delivery system.

However, under 34 CFR 75.105(c)(1), an application that meets this invitational priority does not receive competitive or absolute preference over other applications.

For Applications or Information Contact: Sherrita Gary, Office of Developmental Programs, U.S. Department of Education, 400 Maryland Avenue SW., room 3332, Switzer Building, Washington, DC 20202-2650. Telephone: (202) 732-1351.

Program Authority: 29 U.S.C. 774.

Dated: February 20, 1990.

Michael E. Vader,

Acting Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 90-4208 Filed 2-23-90; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No.: 84.129V]

State Vocational Rehabilitation Unit In-Service Training Program Revised Notice Inviting Applications for New Awards for Fiscal Year (FY) 1990

Purpose of Program: This program provides grants to State agencies and other public or nonprofit agencies and organizations, including institutions of higher education, to support special projects for training State vocational rehabilitation unit personnel in program areas essential to the effective management of the unit's program of vocational rehabilitation services or in skill areas that will enable State unit personnel to improve their ability to provide vocational rehabilitation services to individuals with severe disabilities.

SUPPLEMENTARY INFORMATION: This notice replaces a previous notice concerning this program in the Department's combined application notice of September 15, 1989, (54 FR 38328, 38338, and 38341). Complete information was not available at the time the previous notice was prepared.

In the earlier notice, applications were invited for new awards under this program in Regions I, V, and X only. Readers should note that because projects were awarded in fiscal year (FY) 1989 for a period of 36 months, no funds are available for new projects in Region X in FY 1990. However, Regions IV and IX have been added to this revised notice because funds are available for new projects in those regions for FY 1990.

Deadline for Transmittal of Applications: June 5, 1990.

Applications Available: April 3, 1990.

Estimated Total Available Funds: $621,750.

Estimated Available Funds: Region I—$249,650; Region IV—$21,000; Region V—$202,700; Region IX—$148,400.

Estimated Range of Awards: $5,000-$123,400.

Estimated Average Size of Awards: $36,573.

Estimated Number of Awards: Region I—9; Region IV—1; Region V—4; Region IX—3.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, and 85; and (b) The regulations for this program in 34 CFR Parts 385 and 388.

For Applications or Information Contact: Sherrita Gary, Office of

Developmental Programs, U.S. Department of Education, 400 Maryland Avenue SW., room 3332, Switzer Building, Washington, DC 20202-2650. Telephone: (202) 732-1351.

Program Authority: 29 U.S.C. 774.

Dated: February 20, 1990.

Robert R. Davila,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 90-4207 Filed 2-23-90; 8:45 am]

BILLING CODE 4000-01-M

Full Council Meeting of the National Advisory Council on Educational Research and Improvement

AGENCY: National Advisory Council on Educational Research and Improvement.

ACTION: Full Council Meeting of the National Advisory Council on Educational Research and Improvement.

SUMMARY: This notice sets forth the schedule and agenda of a forthcoming meeting of the National Advisory Council on Educational Research and Improvement. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

DATES: March 14, 15 and 16, 1990.

ADDRESSES: The Council will meet on March 14 from 1 to 5 p.m. and on March 15 from 9 a.m. to 5 p.m. in the conference room, 5100 corridor, Mary E. Switzer Building, 330 C Street, SW. The Council will meet on March 16 in Board Room 108 of the Capitol Hill Hotel, 200 C Street, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mary Grace Lucier, Executive Director, National Advisory Council on Educational Research and Improvement, 330 C Street, SW., suite 4076, Washington, DC 20202-7579, (202) 732-4504.

SUPPLEMENTARY INFORMATION: Meetings of the Council are open to the public. The agenda for March 14 will include a briefing on the National Diffusion Network. On March 15, members will discuss improving dissemination of research findings with officials of the Office of Educational Research and Improvement, and with members of the educational research community. On March 16 members will consider their response and draft recommendations.

Records are kept of all Council Proceedings and are available for public inspection at the Office of the National Advisory Council on Educational Research and Improvement, 330 C Street, SW., room 4076, Washington, DC 20202-7579, from 9 a.m. to 5 p.m. Monday through Friday.

Dated: February 20, 1990.

Mary Grace Lucier,

Executive Director.

[FR Doc. 90-4279 Filed 2-23-90; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Office of Fossil Energy

[FE Docket No. 89-87-NG]

Mobile Natural Gas Inc.; Order Granting Blanket Authorization To Import Natural Gas Including Liquefied Natural Gas and Granting Intervention

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of an Order Granting Blanket Authorization To Import Natural Gas including Liquefied Natural Gas.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice that it has issued an order granting Mobile Natural Gas Inc. (MNGI) blanket authorization to import natural gas. The order issued in FE Docket No. 89-87-NG authorizes MNGI to import up to 100 Bcf of natural gas including liquefied natural gas (LNG) using existing pipeline or LNG facilities over a two-year period beginning on the date of first delivery.

A copy of this order is available for inspection and copying in the Office of Fuels Programs Docket Room, 3F-056, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, February 16, 1990.

Clifford P. Tomaszewski,

Acting Deputy Assistant Secretary for Fuels Programs, Office of Fossil Energy.

[FR Doc. 90-4303 Filed 2-23-90; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Project No. 2069 Arizona]

Arizona Public Service Co.; Intent To File an Application for a New License

February 20, 1990.

Take notice that on December 27, 1989, Arizona Public Service Company, the existing licensee for the Childs-Irving Hydroelectric Project No. 2069, filed a notice of intent to file an application for a new license, pursuant to 18 CFR 16.6 of the Commissions Regulations (revised January 9, 1990). The original license for Project No. 2069 was issued effective January 1, 1945, and expires December 31, 1994.

The project is located on the Fossil Creek in Yavapai and Gila Counties, Arizona. The principal works of the Childs-Irving Project include two developments named Childs and Irving: two diversion dams; a regulating reservoir; 8 miles of conduit, a 4,888-foot-long pressure tunnel, a 1,394-foot-long concrete pipe, and a 4,635-foot-long penstock; two powerhouses with a total installed capacity of 7,000 kW; 69-kV transmission lines; and appurtenant facilities.

Pursuant to 18 CFR 16.7, the licensee is required henceforth to make available certain information to the public. This information is now available from the licensee at 400 North Fifth Street, 13th Floor, Phoenix, AZ 85072-3999.

Pursuant to 18 CFR 16.8, 16.9 and 16.10, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by December 31, 1992.

Lois D. Cashell,

Secretary.

[FR Doc. 90-4229 Filed 2-23-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. TQ90-3-45-000]

Inter-City Minnesota Pipelines Ltd., Inc.; Tariff Filing

February 20, 1990.

Take notice that on February 13, 1990, Inter-City Minnesota Pipelines Ltd., Inc. ("Inter-City"), 245 Yorkland Boulevard, North York, Ontario, Canada M2J 1R1, tendered for filing a revised tariff sheet to Original Volume 1 of its FERC Gas Tariff to be effective March 1, 1990.

Original Volume No. 1

Thirty-Eighth Revised Sheet No. 4

This revised tariff sheet is an out-of-cycle PGA. Inter-City states that this out-of-cycle PGA reflects an increase in demand charges.

Inter-City states that copies of the filing have been mailed to all of its customers and the affected state regulatory commission.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825

North Capitol Street, Washington, DC 20426, in accordance Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before February 27, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-4230 Filed 2-23-90; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 2188 Montana]

Montana Power Co.; Intent to File an Application for a New License

February 20, 1990.

Take notice that on November 24, 1989, Montana Power Company, the existing licensee for the Missouri-Madison Hydroelectric Project No. 2188, filed a notice of intent to file an application for a new license, pursuant to 18 CFR 16.6 of the Commissions Regulations (revised January 9, 1990). The original license for Project No. 2188 was issued effective December 1, 1948, and expires November 30, 1994.

The project is located on the Missouri and Madison Rivers in Cascade, Lewis & Clark, Madison, and Gallatin Counties, Montana. The principal works of the Missouri-Madison Project include nine developments, eight with generating units and one with storage only: nine dams and a total reservoir capacity of about 580,800 acre-feet; a total powerhouse installed capacity of 286,100 kW; transmission line connections; and appurtenant facilities.

Pursuant to 18 CFR 16.7, the licensee is required henceforth to make available certain information to the public. This information is now available from the licensee at 40 East Broadway, Butte, Montana 59701.

Pursuant to 18 CFR 16.8, 16.9 and 16.10, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by November 30, 1992.

Lois D. Cashell,

Secretary.

[FR Doc. 90-4231 Filed 2-23-90; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ90-2-56-001]

Valero Interstate Transmission Co.; Change in Tariff Sheets

February 20, 1990.

Take notice that on February 7, 1990, Valero Interstate Transmission Company (Valero) filed Substitute 17th Revised Sheet No. 14.2 to its FERC Gas Tariff, Original Volume No. 1, correcting a typographical error.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989). All such protests should be filed on or before February 27, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 90-4232 Filed 2-23-90; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPTS-59280; FRL 3713-2]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices; Test Market Exemption Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA may upon application exempt any person from the premanufacturing notification requirements of section 5 (a) or (b) of the Toxic Substance Control Act (TSCA) to permit the person to manufacture or process a chemical for test marketing purposes under section 5(h)(1) of TSCA. Requirements for test marketing exemption (TME) applications, which must either be approved or denied within 45 days of receipt are discussed in EPA's final rule published in the Federal Register of May 13, 1983 (48 FR 21722). This notice, issued under section 5(h)(6) of TSCA, announces receipt of 3 application(s) for exemption, provides a summary, and requests comments on the appropriateness of granting this exemption.

DATES:

Written comments by:

T 90-2, February 22, 1990.
T 90-3, February 28, 1990.
T 90-4, March 2, 1990.

ADDRESSES: Written comments, identified by the document control number "(OPTS-59280)" and the specific TME number should be sent to: Document Processing Center (TS-790), Office of Toxic Substances, Environmental Protection Agency, 401 M Street, SW., Rm. L-100, Washington, DC 20460, (202) 382-3532.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. E-545, 401 M Street, SW., Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer of the TME received by EPA. The complete nonconfidential document is available in the Public Reading Room NE-G004 at the above address between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

T 90-2

Close of Review Period. March 8, 1990.

Manufacturer. Confidential.

Chemical. (G) Amines, bis(hydrogenated tallow alkyl)methyl, dioleates.

Use/Production. (G) Fabric softener and antistatic agent. Prod. range: Confidential.

T 90-3

Close of Review Period. March 14, 1990.

Manufacturer. Confidential.

Chemical. (G) Isocyanate prepolymer.

Use/Production. (G) Curing agent additive for surface coating. Prod. range: Confidential.

T 90-4

Close of Review Period. March 16, 1990.

Manufacturer. Confidential.

Chemical. (G) Modified alpha terpinene and alpha phellandrene camphene.

Use/Production. (G) Used on the inedible foliage of agricultral crops. Prod. range: 30,000 kg/yr.

Dated: February 20, 1990.

Steven Newburg-Rinn,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 90-4298, Filed 2-23-90; 8:45 am]

BILLING CODE 6560-50-D

[OPTS-51745; FRL 3713-3]

Toxic and Hazardous Substances; Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13,1983 (48 FR 21722). This notice announces receipt of 78 such PMNs and provides a summary of each.

DATES: Close of review periods:

P 90-294, 90-301, 90-302, 90-303, March 26, 1990.

P 90-304, April 2, 1990.

P 90-305, 90-306, 90-307, 90-308, 90-309, 90-310, 90-311, 90-312,March 26, 1990.

P 90-313, 90-314, 90-315, 90-316, 90-317, 90-318, 90-319, March 27, 1990.

P 90-320, 90-321, 90-322, March 28, 1990.

P 90-323, March 25, 1990.

P 90-324, 90-325, 90-326, 90-327, 90-328, March 28, 1990.

P 90-329, March 11, 1990.

P 90-331, April 2, 1990.

P 90-332, 90-333, 90-334, 90-335, April 4, 1990.

P 90-336, 90-337, 90-338, April 8, 1990.

P 90-339, April 9, 1990.

P 90-341, 90-343, 90-344, 90-345, 90-346, 90-347, 90-348, 90-349, 90-350,90-351, 90-352, April 10, 1990.

P 90-354, April 11, 1990.

P 90-355, April 15, 1990.

P 90-356, April 10, 1990.

P 90-357, 90-359, 90-360, 90-361, 90-362, 90-363, 90-364, 90-365, 90-366, April 15, 1990.

P 90-367, 90-368, 90-369, 90-370, 90-371, 90-372, 90-373, 90-374, 90-375, April 16, 1990.

P 90-376, 90-377, April 18, 1990.

P 90-378, April 21, 1990.

P 90-379, 90-380, 90-381, April 22, 1990.

P 90-382, April 25, 1990.

Written comments by:

P 90-294, 90-301, 90-302, 90-303, February 24, 1990.

P 90-304, March 3, 1990.

P 90-305, 90-306, 90-307, 90-308, 90-309, 90-310, 90-311, 90-312, February 24, 1990.

P 90-313, 90-314, 90-315, 90-316, 90-317, 90-318, 90-319, February 25, 1990.

P 90-320, 90-321, 90-322, February 26, 1990.

P 90-323, February 23, 1990.

P 90-324, 90-325, 90-326, 90-327, 90-328, February 26, 1990.

P 90-329, February 9, 1990.

P 90-331, March 3, 1990.

P 90-332, 90-333, 90-334, 90-335, March 5, 1990.

P 90-336, 90-337, 90-338, March 9, 1990.

P 90-339, March 10, 1990.

P 90-341, 90-343, 90-344, 90-345, 90-346, 90-347, 90-348, 90-349, 90-350, 90-351, 90-352, March 11, 1990.

P 90-354, March 12, 1990.

P 90-355, March 16, 1990.

P 90-356, March 11, 1990.

P 90-357, 90-359, 90-360, 90-361, 90-362, 90-363, 90-364, 90-365, 90-366, March 16, 1990.

P 90-367, 90-368, 90-369, 90-370, 90-371, 90-372, 90-373, 90-374, 90-375, March 17, 1990.

P 90-376, 90-377, March 19, 1990.

P 90-378, March 22, 1990.

P 90-379, 90-380, 90-381, March 23, 1990.

P 90-382, March 26, 1990.

ADDRESSES: Written comments, identified by the document control number "(OPTS-51745)" and the specific PMN number should be sent to: Document Processing Center (TS-790), Office of Toxic Substances, Environmental Protection Agency, 401 M Street, SW., Room L-100, Washington, DC 20460, (202) 382-3532.

FOR FURTHER INFORMATION CONTACT: Michael M. Stahl, Director, Environmental Assistance Division (TS-799), Office of Toxic Substances, Environmental Protection Agency, Room EB-44, 401 M Street, SW., Washington, DC 20460 (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: The following notice contains information extracted from the nonconfidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete nonconfidential document is available in the Public Reading Room NE-G004 at the above address between 8 a.m. and 4 p.m., Monday through Friday, excluding legal holidays.

P 90-294

Manufacturer. Confidential.

Chemical. (G) NCO terminated urethane.

Use/Production. (G) Adhesive for open nondispersive use on varying substances. Prod. range: Confidential.

P 90-301

Manufacturer. Allied-Signal, Inc.

Chemical. (G) Vinyl ether terminated ester.

Use/Production. (S) Coating/inks/adhesives. Prod. range: Confidential.

P 90-302

Manufacturer. Allied-Signal, Inc.

Chemical. (G) Vinyl ether terminated urethane.

Use/Production. (S) Coatings/inks/adhesives. Prod. range: Confidential.

P 90-303

Manufacturer. Allied-Signal, Inc.

Chemical. (G) Vinyl ether terminated urethane.

Use/Production. (S) Coatings/inks/adhesives. Prod. range: Confidential.

P 90-304

Manufacturer. Allied-Signal, Inc.

Chemical. (G) Vinyl ether terminated urethane.

Use/Production. (S) Coatings/inks/adhesives. Prod. range: Confidential.

P 90-305

Manufacturer. Rexene Corporation.

Chemical. (G) Degradable polyethylene.

Use/Production. (G) Degradable additive. Prod. range: Confidential.

P 90-306

Manufacturer. Stepan Company.

Chemical. (G) Amido carbony benzoate.

Use/Production. (G) Surfactant/conditioning agent/suspending agent. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5 g/kg species (Rat). Skin sensitization: negative species (Guinea pig).

P 90-307

Manufacturer. Stepan Company.

Chemical. (G) Amido carboxy benzoate.

Use/Production. (G) Surfactant/conditioning agent/suspending agent. Prod. range: Confidential.

P 90-308

Manufacturer. Stepan Company.

Chemical. (G) Amido carboxy benzoate.

Use/Production. (G) Surfactant/conditioning agent/suspending agent. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5 g/kg species (Rat).

P 90-309

Manufacturer. Stepan Company.

Chemical. (G) Amido carboxy benzoate.

Use/Production. (G) Surfactant/conditioning agent/suspending agent. Prod. range: Confidential.

P 90-310

Manufacturer. Stepan Company.

Chemical. (G) Amido carboxy benzoate.

Use/Production. (G) Surfactant/conditioning agent/suspending agent. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5 g/kg species (Rat). Skin sensitization: negative species (Guinea pig).

P 90-311

Manufacturer. Stepan Company.

Chemical. (G) Amido carboxyl benzoate.

Use/Production. (G) Surfactant/conditioning agent/suspending agent. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5 g/kg species (rat). Skin sensitization: negative species (Guinea pig).

P 90-312

Manufacturer. Stepan Company.

Chemical. (G) Amido carboxy benzoate.

Use/Production. (G) Surfactant/conditioning agent/suspending agent. Prod. range: Confidential.

Toxicity Data. Skin sensitization: negative species (Guinea pig).

P 90-313

Manufacturer. Confidential.

Chemical. (G) Reaction product of an acrylic acid and a nonvoloid resin.

Use/Production. (G) Protective treatment for nylon fiber. Prod. range: Confidential.

P 90-314

Manufacturer. Confidential.

Chemical. (G) Reaction product of an acrylic acid and a novoloid resin.

Use/Production. (G) Protective treatment for nylon fiber. Prod. range: Confidential.

P 90-315

Manufacturer. Confidential.

Chemical. (G) Reaction product of an acrylic acid and a novoloid resin.

Use/Production. (G) Protective treatment for nylon fiber. Prod. range: Confidential.

P 90-316

Manufacturer. Confidential.

Chemical. (G) Reaction product of an acrylic acid and a novoloid resin.

Use/Production. (G) Protective treatment for nylon fiber. Prod. range: Confidential.

P 90-317

Manufacturer. Confidential.

Chemical. (G) Reaction product of an acrylic acid and a novoloid resin.

Use/Production. (G) Protective treatment for nylon fiber. Prod. range: Confidential.

P 90-318

Manufacturer. Confidential.

Chemical. (G) Reaction product of an acrylic acid and a novoloid resin.

Use/Production. (G) Protective treatment for nylon fiber. Prod. range: Confidential.

P 90-319

Manufacturer. Nachem, Inc.

Chemical. (G) Acrylated diaminophenyl-azo-aryl compound.

Use/Production. (G) Dyeing and printing of synthetic fiber and fabric. Prod. range: Confidential.

Toxicity Data. Skin irritation: negligible species (Rabbit).

P 90-320

Manufacturer. Confidential.

Chemical. (G) Acrylic copolymer, sodium salt.

Use/Production. (G) Emulsion breaker. Prod. range: Confidential.

P 90-321

Manufacturer. Confidential.

Chemical. (G) Acrylic copolymer.

Use/Production. (G) Water treatment. Prod. range: Confidential.

P 90-322

Manufacturer. Confidential.

Chemical. (G) Amino functional polyorgano siloxane derivative.

Use/Production. (G) Fabric softener. Prod. range: Confidential.

P 90-323

Manufacturer. Confidential.

Chemical. (G) Disubstituted hydroxypolycycle.

Use/Production. (S) Organic synethesis intermediate. Prod. range: 12,000–43,000 kg/yr.

Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (Rat). Eye irritation: slight species (Rabbit). Skin irritation: negligible species (Rabbit). Mutagenicity: negative. Skin sensitization: negative species (Guinea pig).

P 90-324

Manufacturer. Milliken & Company.

Chemical. (G) Poly(oxyalkyl)-substituted aniline.

Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

P 90-325

Manufacturer. Milliken & Company.

Chemical. (G) Poly(oxyalkylene)aniline, carboxylic acid ester.

Use/Production. (G) Chemical intermediate. Prod. range: Confidential.

P 90-326

Manufacturer. Milliken & Company.

Chemical. (G) Substituted polyoxyalkylene aniline.

Use/Production. (G) Colorant. Prod. range: Confidential.

P 90-327

Manufacturer. Milliken & Company.

Chemical. (G) Substituted polyoxyalkylene aniline.

Use/Production. (G) Colorant. Prod. range: Confidential.

P 90-328

Manufacturer. Milliken & Company.

Chemical. (G) Substituted polyoxyalkylene aniline.

Use/Production. (G) Colorant. Prod. range: Confidential.

P 90-329

Manufacturer. Epolin, Inc.

Chemical. (G) Polysilicone urethane acrylate.

Use/Production. (S) An oligomer in a formulated product for coatings, clear printing varnish. Prod. range: 2,500–49,500 kg/yr.

P 90-331

Manufacturer. H.B. Fuller.

Chemical. (G) Maleic anhydride alkene copolymer, reaction product with ammonia.

Use/Production. (G) Adhesive. Prod. range: Confidential.

P 90-332

Manufacturer. Caschem, Inc.

Chemical. (G) Diamine of fatty acids.

Use/Production. (S) Epoxy or isocyanate curing agent. Prod. range: 250,000–1,000,000 kg/yr.

Toxicity Data. Acute oral toxicity: LD50 > 50mg species (Rat). Acute dermal toxicity: LD50 > 200 mg/kg. Inhalation toxicity: LC50 > 2 mg/l species (Rat). Eye irritation: none species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-333

Manufacturer. Noramco, Inc.

Chemical. (S)2-(2'-Hydroxy-5'-methacrylyloxyethylphenyl)-2H-benzotriazole.

Use/Production. (G) Molding resin. Prod. range: 1,000,000–14,000,000 kg/yr.

P 90–334

Manufacturer. Confidential.

Chemical. (G) Alkanedioc acid salt with tris(hydroxyslkyl)amine.

Use/Production. (G) Surface treatment dispersive and for inorgansism pigment. Prod. range: Confidential.

P 90–335

Manufacturer. Noramco, Inc.

Chemical. (G) 2-Substituted benzotriazole.

Use/Production. (G) Chemical intermediate/stabilizer for plastics and coatings. Prod. range: Confidential.

Toxicity Data. Skin irritation: negligible species (Rabbit). Mutagenicity: negative.

P 90–336

Manufacturer. E.I. du Pont de Nemous & Co., Inc.

Chemical. (G) Bis(dimethyl imidodicarbonimidato-n,n')-metal salt.

Use/Production. (G) Industrial intermediate. Prod. range: Confidential.

P 90–337

Manufacturer. AKZO Coating Inc.

Chemical. (G) Rosin maleic anhydride substituted phenol formaldehyde pentaerythritol polymer.

Use/Production. (S) Printing ink. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 5,000 mg/kg species (Rat). Eye irritation: none species (Rabbit). Skin irritation: negligible species (Rabbit).

P 90–338

Importer. Basf Corporation.

Chemical. (G) Elastomeric tetramonomeric polymer.

Use/Import. (S) Polymers for blending with arylic resin. Import range: Confidential.

P 90–339

Manufacturer. BioTechnica Agriculture, Inc.

Microorganism: (G) 'Rhizobium' 'meliloti' strain SU47 from the Rothamsted Experiment Station collection was modified, using recombinant DNA techniques, to contain an antibiotic resistance marker and other genes to enhance nitrogen-fixing ability. The following genes were introduced: kanamycin/neomycin and bleomycin resistance genes from 'Klebsiella' 'pneumoniae', transcriptional terminator sequences from 'Escherichia' 'coli', and additional genes to enhance the nitrogen-fixation.

Use/Production: (G) The small-scale field trials are proposed to assess the effect of the genetically engineered strain on yield of alfalfa and to study the effect of inoculant delivery method on the ecology of the genetically engineered strain. Production range: 1.2×1013 cells per year.

Test data: Greenhouse tests indicated that after 21 days the dry weight of alfalfa grown with the genetically engineered strain was 7–15% greater than alfalfa grown with an unmodified rhizobia strain.

Exposure: 'Human': Production and field application, maximum of 8 people. 'Environmental': Test data indicate that this strain will establish and persist in the rhizosphere of the alfalfa root at population densities similar to the unmodified parent strain.

Environmental: 'Release': In the small scale field trials, release to air, soil, and water are possible. Cells may be applied in an aqueous suspension using a sprayer unit or the seed may be coated with this strain prior to planting in the field. The total acreage involved in these tests is 0.51 acres, of which 0.05 acres will be treated with recombinant rhizobia. The two proposed field test sites are: Hampden Township, Columbia County and Sun Prairie, Dane County, Wisconsin. 'Disposal': Laboratory cultures are sterilized before disposal into Publicly Owned Treatment Works.

P 90–341

Manufacturer. Hercules Incorporated.

Chemical. (G) Polyarylacetylenic resin.

Use/Production. (S) Resin for carbon fiber composites. Prod. range: Confidential.

P 90–343

Manufacturer. Stephan Company.

Chemical. (G) Amidocarboxy benzoic acid.

Use/Production. (S) Conditioning agent, suspending agent and fabric softener. Prod. range: Confidential.

P 90–344

Importer. Confidential.

Chemical. (G) Polyamide copolymer.

Use/Import. (G) Hot melt fabric adhesive. Import range: Confidential.

P 90–345

Manufacturer. Confidential.

Chemical. (G) Polyurethane-urea.

Use/Production. (G) Glass fiber sizing/leather coatings. Prod. range: 100,000–300,000 kg/yr.

P 90–346

Manufacturer. Confidential.

Chemical. (G) Acrylic modified linseed oil copolymer.

Use/Production. (S) Binder for automotive finishes. Prod. range: Confidential.

P 90–347

Importer. Confidential.

Chemical. (G) Reaction product of alphatic diglycidyl ether and methacrylic acid.

Use/Import. (G) Shot sensitive resin. Import range: Confidential.

P 90–348

Importer. Hodogaya Chemical (U.S.A.), Inc.

Chemical. (G) 1-Tetradecanaminium, n,n-dimithyl-n-tetrdecyl-, hexa-.mu.-oxotetra-. mu.3-oxdi-. mu.5-oxotetradecaoxo-octamolybdate(4-) (4:1).

Use/Import. (G) Additive for printing and copying toners. Import range: Confidential.

P 90–349

Importer. Hodogaya Chemical (U.S.A.), Inc.

Chemical. (G) Chromate(3-), bis(6-amino-4-hydroxy-3-[(2-hydroxy-3,5-dinitrophenyl)azo)-2-naphththalenesulfonato(3-)-trisodium.

Use/Import. (G) Coloring agent for anodized metal. Import range: Confidential.

P 90–350

Importer. Hodogaya Chemical (U.S.A.), Inc.

Chemical. (G) Chromate(3-), bis(7-amino-4-hydroxy-3-[(2-hydroxy-3,5-dinitrophenyl)azo)-2-naphthalenesulfonato(3-)-trisodium.

Use/Import. (G) Coloring agent for anodized metal. Import range: Confidential.

P 90–351

Manufacturer. Confidential.

Chemical. (G) Styreneacrylic acrylonitrile terpolymer.

Use/Production. (G) Polymera seed intermediate. Prod. range: Confidential.

P 90–352

Manufacturer. Confidential.

Chemical. (G) Styrene acrylic acrylonitrile terpolymer.

Use/Production. (G) Paper coating additive. Prod. range: Confidential.

Toxicity Data. Eye irritation: none species (Rabbit). Skin irritation: negligible species (Rabbit). Mutagenicity: negative. Skin sensitization: negative species (Guinea pig).

P 90–354

Manufacturer. Confidential.

Chemical. (G) Modified acrylic polymer.

Use/Production. (G) Coatings additive. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50>5 g/kg species (Rat). Acute dermal toxicity: LD50>5 g/kg species (Rat). Eye irritation: moderate species (Rabbit). Mutagenicity: negative. Skin irritation: negligible species (Rabbit).

P 90-355

Importer. Nicca U.S.A., Inc.

Chemical. (S)N,N,N,N-Tetrakis (stearamidoethyl)urea.

Use/Import. (S) Softner cotton/ester fibers. Import range: Confidential.

P 90-356

Importer. Nicca U.S.A., Inc.

Chemical. (S) Tall oil fatty ester of ethoxylated-a-nonylphenyl-w-hydroxy-polymer with formaldehyde.

Use/Import. (S) A disperse dye carrier for finishing polyester ester fibers. Import range: Confidential.

P 90-357

Importer. Nicca U.S.A., Inc.

Chemical. (S) Coconut fatty acid ester of ethoxylated-a-nonylphenyl-w-hydroxy-polymer with formaldehyde.

Use/Import. (S) Disperse dye carrier for finishing polyester fibers. Import range: Confidential.

P 90-359

Importer. Nicca U.S.A., Inc.

Chemical. (S) Ammonium salt of 2-octadecenylcoxymethyl-2-octadecenoyl polyoxethyloxymethyl-2octadecenoyl polyoxethylenemethyl-3-polyoxyethylene-propylpolyethane sulfate.

Use/Import. (S) A disperse dye carrier for finishing polyester fibers. Import range: Confidential.

P 90-360

Importer. Nicca U.S.A., Inc.

Chemical. (S) 3,4,6-Tris(1-phenylethyl)phenylpolyoxyethylene octadecenoyloxethoxymethylether.

Use/Import. (S) A disperse dye carrier for finishing polyester fibers. Import range: Confidential.

P 90-361

Importer. Nicca U.S.A., Inc.

Chemical. (S) N,N,-Bis (stearamid ethyl) diquanine.

Use/Import. (S) Softner for cotton. Import range: Confidential.

P 90-362

Importer. Nicca U.S.A., Inc.

Chemical. (S) Lanolin fatty oil ester of ethoxylated-a-nonylphenyl-w-polymer with formaldehyde.

Use/Import. (S) Disperse dye carrier for finishing polyester fibers. Import range: Confidential.

P 90-363

Importer. Nicca U.S.A., Inc.

Chemical. (S) Ammonium salt of polyoxypropylene polyoxyethylene w-(1-phenol-2-hydroxyethyl) ether.

Use/Import. (S) A disperse dye carrier for finishing polyester fibers. Import range: Confidential.

P 90-364

Importer. Nicca U.S.A., Inc.

Chemical. (S) Tall oil fatty acid ester with polyoxy (1,2-ethane-dil)-w-hydroxy-2,4,6-tris (1,phenyl ethyl) phenol ether.

Use/Import. (S) Soaping agent for dyeing equipment polyester, cotton, acetate fibers and carrier for polyester fibers. Import range: Confidential.

P 90-365

Manufacturer. Amoco Performance Products, Inc.

Chemical. (G) Aromatic diearboxylic acid triaromatic polyester.

Use/Production. (S) Engineers material. Prod. range: Confidential.

P 90-366

Manufacturer. Confidential.

Chemical. (G) Polyurethane-urea.

Use/Production. (S) Automotive primer surface. Prod. range: 20,000-300,000 kg/yr.

P 90-367

Manufacturer. Confidential.

Chemical. (G) Polyester resin.

Use/Production. (G) Open, nondispersive use. Prod. range: Confidential.

P 90-368

Manufacturer. Confidential.

Chemical. (G) Neutralilzed acid catalyst.

Use/Production. (G) Catalyst. Prod. range: Confidential.

P 90-369

Manufacturer. Confidential.

Chemical. (G) Alkylaryl sulfonate, amine salt.

Use/Production. (G) Additive for the energy production industry. Prod. range: Confidential.

P 90-370

Importer. Basf Corporation.

Chemical. (G) Nickel-isoindoline complex.

Use/Import. (S) Automobile coating. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50>5,000 mg/kg species (Rat). Inhalation toxicity: LC50>5.2 mg/l species (Rat). Eye irritation: none species (Rabbit). Mutagenicity: negative. Skin irritation: negligible species (Rabbit).

P 90-371

Manufacturer. The Shephard Chemical Company.

Chemical. (G) Cobalt neopentanate.

Use/Production. (S) Ingredient of an adhesive promoter. Prod. range: 6,800-11,340 kg/yr.

Toxicity Data. Acute oral toxicity: LD50 1.18 g/kg species (Rat). Acute dermal toxicity: LD50>5.2 g/kg species (Rabbit). Eye irritation: moderate. Skin irritation: negligible species (Rabbit). Skin sensitization: positive species (Guinea pig).

P 90-372

Manufacturer. The Dow Chemical Company.

Chemical. (G) Bisphenols.

Use/Production. (G) Monomer for engineering thermal plastic. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50>5,000 mg/kg species (Rat). Skin irritation: negligible species (Rabbit). Mutagenicity: negative.

P 90-373

Importer. Basf Corporation.

Chemical. (G) Cobalt complex dye of monoazo dyestuff.

Use/Import. (S) Colorant For wood stain. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 10,000 mg/kg species (Rat). Static acute toxicity: time LC50 96h 100-200 mg/l species (Golgen orfe). Eye irritation: moderate species (Rabbit). Skin irritation: slight species (Rabbit).

P 90-374

Manufacturer. Tennant Company.

Chemical. (G) The ammonio derivative of a copolymer of polyalkylglycols, toluene diiscoyanate and an alkyl polyamine.

Use/Production. (G) Open, nondispersive use. Prod. range: 130,000-260,000 kg/yr.

P 90-375

Importer. Ems-American Grilon, Inc.

Chemical. (G) Copolyamide of terephthalic acid (a), isophathalic acid (b), hexamethylene diamine (c), isophoronediamine (d) and caprolactum (e).

Use/Import. (S) Polymers for compounding. Import range: Confidential.

P 90-376

Manufacturer. R.T Vanderbilt Company.

Chemical. (G) 2,5-dimercapto-1,3,4-thiadiazole reaction product.

Use/Production. (S) Antioxidant and antiwear agent for lubricants. Prod. range: Confidential.

P 90-377

Importer. Ciba-Geigy Corporation.

Chemical. (G) Diazo naphthalenesulfonic acid, sodium salt.

Use/Import. (G) Textile dye. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 2,000 mg/kg species (Rat). Acute dermal toxicity: LD50 > 2,000 mg/kg species (Rabbit). Eye irritation: none species (Rabbit). Mutagenicity: positive. Static acute toxicity: time LC50 96h > 1,000 mg/l species (zebraish). Skin irritation: negligible species (Rabbit).

P 90-378

Manufacturer. Interplastic Corporation.

Chemical. (G) Unsaturated polyester resin.

Use/Production. (S) Molding resin. Prod. range: 1,000,000-14,000,000 kg/yr.

P 90-379

Manufacturer. Confidential.

Chemical. (G) Alkylated napthalenes.

Use/Production. (G) Fuel additive. Prod. range: Confidential.

P 90-380

Manufacturer. Bostik, Inc.

Chemical. (G) Polyurethane prepolymer.

Use/Production. (S) Prepolymer to be used in the compounding of adhesives and sealants. Prod. range: Confidential.

P 90-381

Importer. Confidential.

Chemical. (G) Poly aromatic resin.

Use/Import. (G) Manufacture of articles for the aerospace industry. Import range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 2,000 mg/kg species (Rat). Eye irritation: none species (Rabbit). Skin irritation: negligible species (Rabbit).

P 90-382

Manufacturer. Dow Corning Corporation.

Chemical. (S) Silsesquioxanes, hydrogen.

Use/Production. (S) Electronics coating. Prod. range: Confidential.

Toxicity Data. Acute oral toxicity: LD50 > 5,000 mg/kg species (Rat). Eye irritation: none species (Rabbit). Mutagenicity: negative. Skin irritation: negligible species (Rabbit).

Date: February 20, 1990.

Steven Newburg-Rinn,

Acting Director, Information Management Division, Office of Toxic Substances.

[FR Doc. 90-4299 Filed 2-23-90; 8:45 am]

BILLING CODE 6560-50-D

FEDERAL COMMUNICATIONS COMMISSION

[GEN Docket No. 89-573; DA 90-153]

Philadelphia Region Public Safety Plan

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The FCC is accepting the Philadelphia area's (Region 28's) plan for public safety. By accepting this plan, the FCC enables the licensing of the 821-824/866-869 MHz spectrum for public safety to begin.

EFFECTIVE DATE: February 9, 1990.

FOR FURTHER INFORMATION CONTACT: Maureen Cesaitis, Private Radio Bureau, Policy and Planning Branch, Washington, DC 20554, (202) 632-6497.

SUPPLEMENTARY INFORMATION:

1. On October 2, 1989, the Philadelphia Metropolitan Area (Region 28) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Region 28 plan was placed on Public Notice for comments on December 14, 1989, 54 FR 51324 (Dec. 14, 1989). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Region 28 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987) 53 FR 1022, January 15, 1988, and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Region 28.

4. Accordingly, *it is ordered*, That the Public Safety Radio Plan for Region 28 is accepted. Furthermore, licensing of the 821-824/866-869 MHz band in Region 28 may commence immediately.

List of Subjects in the Public Safety Plan

Public safety, Special emergency, Trunking, Land mobile.

Federal Communications Commission.

Beverly G. Baker,

Deputy Chief, Private Radio Bureau.

[FR Doc. 90-4277 Filed 2-23-90; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL RESERVE SYSTEM

Canadian Imperial Bank of Commerce, Toronto, Ontario, Canada; Proposal To Engage in Placement as Agent of Debt and Equity Securities; Correction

This notice corrects a previous Federal Register Notice (FR Doc. 89-22020) published at page 38287 of the issue for September 15, 1989.

The notice for Canadian Imperial Bank of Commerce is amended to read as follows:

1. Canadian Imperial Bank of Commerce, Toronto, Ontario, Canada ("Canadian Imperial"), has applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and 225.23(a)(3) of the Board's Regulation Y (12 CFR 225.23(a)(3)), for permission for its subsidiary Wood Gundy Corp., New York, New York ("Company") to engage in the placement, as agent for issuers, of debt and equity securities. Canadian Imperial has also applied for permission for Company to buy and sell all types of securities on the order of investors as a "riskless principal" in accordance with the limitations set out in *Bankers Trust New York Corporation*, 75 Federal Reserve Bulletin 829 (1989).

Comments on this application must be received by March 12, 1990.

Board of Governors of the Federal Reserve System, February 20, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-4243 Filed 2-23-90; 8:45 am]

BILLING CODE 6210-01-M

Casey County Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the

application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than March 16, 1990.

A. **Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Casey County Bancorp, Inc.*, Liberty, Kentucky; to acquire at least 80 percent of the voting shares of Middleburg Bancorp, Inc., Middleburg, Kentucky, and thereby indirectly acquire Farmers Deposit Bank, Middleburg, Kentucky.

B. **Federal Reserve Bank of Minneapolis** (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Yellowstone Trail Bancorporation*, Ispwich, South Dakota; to become a bank holding company by acquiring 100 percent of the voting shares of Ipswich State Bank, Ipswich, South Dakota.

Board of Governors of the Federal Reserve System, February 20, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-4244 Filed 2-23-90; 8:45 am]

BILLING CODE 6210-01-M

Change in Bank Control Notice; Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than March 12, 1990.

A. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Jimmy Harrell*, Leedy, Oklahoma, to acquire 8.9 percent for a total of 25.0 percent; Graydon L. Lantz, Elk City, Oklahoma, to acquire 8.9 percent for a total of 25.8 percent; David L. Harrell, Leedy, Oklahoma, to acquire 8.9 percent for a total of 25.8 percent; and Robert L. Newcomb, Elk City, Oklahoma, to acquire 8.9 percent for a total of 25.8 percent of the voting shares of Western Oklahoma Bancshares, Inc., Elk City, Oklahoma, and thereby indirectly acquire Bank of Western Oklahoma, Elk City, Oklahoma.

Board of Governors of the Federal Reserve System, February 20, 1990.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 90-4245 Filed 2-23-90; 8:45 am]

BILLING CODE 6210-01-M

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney general for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period:

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: FEB. 5, 1990 AND FEB. 16, 1990

Name of acquiring person, name of acquired person, name of acquired entity	PMN number	Date terminated
The DeWitt and Lila Wallace Trust, American Health Partners, American Health Partners	90-0831	02/05/90
Pillar Bryton Holdings, Ltd., American Pioneer, Inc., Catalina Homes, Inc. and The Jonathan Group, Inc	90-0851	02/05/90
Softsel Computer Products, Inc., Microamerica, Inc., Microamerica, Inc	90-0856	02/05/90
AB Aritmos, Christopher H. Smith, Sports Enterprises, Inc	90-0884	02/05/90
Adacom Corporation, Harris Corporation, Harris Corporation	90-0925	02/05/90
The Coastal Corporation, LaSalle Energy Corp., Unitex Offshore Transmission Company and Mud Lake 16"	90-0842	02/06/90
Robert J. Tomsich, The Greyhound Corporation, Consultants & Designers, Inc	90-0914	02/06/90
Narragansett Capital Partners—A, L. P., Frank P. Morsilli, Dryvit Systems, Inc	90-0850	02/07/90
Reinhard Mohn, Johnson and Johnson, Johnson and Johnson	90-0855	02/07/90
Prudential Venture Partners II, Comdata Holdings Corporation, Comdata Holdings Corporation	90-0869	02/07/90
CRH plc, HGP Industries, Inc., HGP Industries, Inc	90-0897	02/07/90
Buhrmann-Tetterode N.V., MSG Securities, E. W. Curry Company, Inc	90-0920	02/07/90
Buhrmann-Tetterode N.V., Henry L. Hillman, Buschart Office Products, Inc	90-0921	02/07/90
Hyplains Group, Inc., Bicentennial Cattle Co., Inc., Bicentennial Cattle Co., Inc	90-0632	02/09/90
The Mitsui Trust & Banking Co., Ltd., Roy S. Neff, Meredith Overbrook Parnters, L.P	90-0815	02/09/90
Vereniging AEGON, Washington National Corporation, Washington National Insurance Company	90-0875	02/09/90
Mega Natural Gas Company, AlaTenn Resources, Inc., Colony Energy Corporation	90-0861	02/12/90
MA Associates, L.P., Kenneth R. Thomson, International Thomson Transport Press, Inc	90-0913	02/12/90
Melville Corporation, Robert J. Lapidus and Nihla M. Lapidus, Bob's Inc	90-0933	02/12/90
James T. Hudson, Pierre Frozen Foods, Inc., Pierre Frozen Foods, Inc	90-0939	02/12/90
Mr. John D. Holloway, Mr. Donald W. Tredinick, St. Johns Trading Co., Inc. and Jax Liquors, Inc	90-0950	02/12/90
Humana Inc., Healthtrust Inc.—The Hospital Company, Village Oaks Hospital Corporation	90-0880	02/15/90
United HealthCare Corporation, Heritage Health Systems, Inc., Heritage Holding Company, Inc	90-0916	02/15/90
Guinness PLC, Grant Metropolitan PLC, All Brand Importers, Inc	90-0948	02/15/90

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: FEB. 5, 1990 AND FEB. 16, 1990—Continued

Name of acquiring person, name of acquired person, name of acquired entity	PMN number	Date terminated
Digital Equipment Corporation, Eastman Kodak Company, Eastman Kodak Company	90-0961	02/16/90
Compagnie Generale d'Electricite, Setpoint, Inc., Setpoint, Inc	90-0962	02/16/90
Kemper Corporation, Peers Holdings, Inc., Peers Holdings, Inc	90-0967	02/16/90
First Wachovia Corporation, Charter Federal Savings Bank, Charter Federal Savings Bank	90-0969	02/16/90
James V. Babcock, York Trust Group plc, York Trust Group plc	90-0976	02/16/90

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Federal Trade Commission, Contact Representative, Premerger Notification Office, Bureau of Competition, Room 303, Washington, DC 20580, (202) 326-3100.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 90-4290 Filed 2-23-90; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Advisory Committee; Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meeting and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

MEETING: The following advisory committee meeting is announced:

Blood Products Advisory Committee

DATE, TIME, AND PLACE: March 14, 1990, 8 a.m., Conference rm. 9, bldg. 31, National Institutes of Health, 9000 Rockville Pike, Bethesda, MD; March 15, 1990, 8:30 a.m., Wilson Hall, bldg. 1, National Institutes of Health, 9000 Rockville Pike, Bethesda, MD.

TYPE OF MEETING AND CONTACT PERSON: Open public hearing, March 14, 1990, 8 a.m. to 9 a.m., unless public participation does not last that long; open committee discussion, 9 a.m. to 9:50 a.m.; closed committee deliberations, 9:50 a.m. to 6 p.m.; open committee discussion, March 15, 1990, 8:30 a.m. to 11:45 a.m.; closed committee deliberations, 11:45 a.m. to 12:15 p.m.; open committee discussion, 12:15 p.m. to 4:45 p.m.; Linda A. Smallwood, Division of Blood and Blood Products (HFB-400), Center for Biologics Evaluation and Research, Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20892, 301-496-4396.

GENERAL FUNCTION OF THE COMMITTEE: The committee reviews and evaluates available data on the safety, effectiveness, and appropriate use of blood products intended for use in the diagnosis, prevention, or treatment of human diseases.

AGENDA—OPEN PUBLIC HEARING: Interested persons requesting to present data, information, or views, orally or in writing, on issues pending before the committee should notify the committee contact person.

OPEN COMMITTEE DISCUSSION: On the morning of March 14, 1990, the committee will hear an overview of hemoglobin-based red cell substitutes' research. On the morning of March 15, 1990, the committee will hear summary discussion on hemoglobin-based red cell substitutes and human immunodeficiency virus, type 2 (HIV-2) testing. In the afternoon, the committee will hear review of clinical data on erythropoietin; review storage, dating, and distribution of irradiated blood; hear updates on donor information materials, and nomenclature for Factor IX concentrates.

CLOSED COMMITTEE DELIBERATIONS: The committee will discuss trade secret or confidential commercial information relevant to pending product license applications and investigational new drugs in the Center for Biologics Evaluation and Research. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (subpart C of 21 CFR part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this **Federal Register** notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

Persons interested in specific agenda items to be discussed in open session may ascertain from the contact person the approximate time of discussion.

Details on the agenda, questions to be addressed by the committee, and a current list of committee members are available from the contact person before and after the meeting. Transcripts of the

open portion of the meeting will be available from the Freedom of Information Office (HFI–35), Food and Drug Administration, room 12A–16, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA–305), Food and Drug Administration, room 4–62, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting will be available from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner, with the concurrence of the Chief Counsel, has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA) (5 U.S.C. app. 2, 10(d)), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, notably deliberative sessions to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a) (1) and (2) of the Federal Advisory Committee Act (5 U.S.C. app. 2), and FDA's regulations (21 CFR part 14) on advisory committees.

Dated: February 17, 1990.

James S. Benson,

Acting Commissioner of Food and Drugs.

[FR Doc. 90–4266 Filed 2–23–90; 8:45 am]

BILLING CODE 4160–01–M

Consumer Participation; Open Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the following district consumer exchange meeting: Atlanta District Office, chaired by John H. Turner, District Director. The topic to be discussed is health issues relative to the rural community: pesticides.

DATES: Tuesday, March 6, 1990, 11 a.m.

ADDRESSES: Fort Valley State College, School of Agriculture, Home Economics, and Allied Programs, State College Drive, Fort Valley, GA 31030.

FOR FURTHER INFORMATION CONTACT: Barbara Ward-Groves, Consumer Affairs Officer, Food and Drug Administration, 60 Eighth St. NE., Atlanta, GA 30309, 404–347–7355.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to encourage dialogue between consumers and FDA officials, to identify and set priorities for current and future health concerns, to enhance relationships between local consumers and FDA's district offices, and to contribute tothe agency's policymaking decisions on vital issues.

Dated: February 20, 1990.

Alan L. Hoeting,

Acting Associate Commissioner for Regulatory Affairs

[FR Doc. 90–4265 Filed 2–23–90; 8:45 am]

BILLING CODE 4160–01–M

Indian Health Service

Tribal Management Program for American Indian/Alaska Native Tribal Organizations: Grants Application Announcement

AGENCY: Indian Health Service, HHS.

ACTION: Notice of competitive grant applications for the Tribal Management Program for American Indian/Alaska Native tribal organizations.

SUMMARY: The Indian Health Service (IHS) announces that competitive applications are now being accepted for the Tribal Management Program for American Indian/Alaska Native Tribal Organizations established by section 103(b)(2) of Public Law 93–638, the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450h(b)(2)), as amended by Public Law 100–472. The regulations governing these grants are codified at 42 CFR part 36, subpart H. This program is within the Catalog of Federal Domestic Assistance Number 13.228. There will be only one funding cycle during Fiscal Year 1990.

DATES: An original and two (2) copies of the completed grant application must be submitted to the Grants Management Specialist, in the appropriate Indian Health Service Area Office receiving the application by close of business on April 30, 1990. Close of business means 4 p.m. local time of the Indian Health Service Area Office receiving the application.

Applications shall be considered as meeting the deadline if they are either: (1) Received on or before the deadline or (2) postmarked on or before the deadline and received in time to be reviewed along with all other timely applications. A legibly dated receipt from a commercial carrier or the U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks will not be accepted as proof of timely mailing.

Applications received after the announced closing date will not be considered for funding.

FOR FURTHER INFORMATION CONTACT: M. Kay Carpenter, Grants Management Officer, Grants Management Branch, Division of Acquisition and Grants Operations, Indian Health Service, room 6A–33, 5600 Fishers Lane, Rockville,

Maryland 20857, (301) 443–5204. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This announcement provides information on the general program purpose, programmatic priorities, eligibility requirements, funding availability, application procedures, grant writing technical assistance workshops, and preapplications for the Tribal Management Program for American Indian/Alaska Native Tribal Organizations for Fiscal Year 1990.

A. General Program Purpose: To increase the management capacity of an American Indian/Alaska Native tribal organization to enter into an agreement under the provisions of Public Law 93–638 to assume operational control of all or part of an existing IHS direct operated health program.

B. Programmatic Priorities: The IHS has established the following general priorities that will be observed in the award of tribal management grants. For activities designed to improve the capacity of a tribal organization to enter into an assumption agreement, preference in funding will be accorded in the following priority order:

1. An Indian tribe or Indian tribal organization, including newly recognized Indian tribes, which have the stated intention of entering into assumption agreements for the first time.

2. An Indian tribe or Indian tribal organization which has the stated intention of increasing their operation of health programs by negotiating additional assumption agreements with the IHS.

3. Indian tribes or Indian tribal organizations that need assistance is improving existing management systems under their operational control.

C. Eligibility Requirements: Any federally recognized Indian tribe or tribal organization as defined in section 4 (d) and (e) of Public Law 93–638, and in 42 CFR part 36, subpart H, § 36.102 (c) and (d), is eligible to apply for a tribal management grant from the IHS.

D. Fund Availability: For Fiscal Year 1990, it is anticipated that $2,190,000 will be available for Public Law 93–638, section 104(b)(2) tribal management grants. Approved projects will be funded at a maximum level of approximately $44,400.

E. Type of Program Activities Considered for Support: Grants will be awarded for projects in five general categories. Tribal management grants are awarded for the purposes of feasibility studies, planning, the development of tribal health management structures, training and staff development, and evaluation studies.

F. Application Process: Application for tribal management grants is governed by regulations codified at 42 CFR part 36, subpart H, § 36.104.

1. An *IHS Tribal Management Grant Application Kit*, including Standard Form 424 (Rev. 4–88) may be obtained from the Grants Management Specialist in the IHS Area Office that serves the applicant. The address and telephone number of the IHS Area Offices are:

Aberdeen Area Indian Health Service, Federal Building, 115 4th Avenue, SE., Aberdeen, South Dakota 57401, (605) 226–7567

Alaska Area Native Health Service, P.O. Box 107741, Anchorage, Alaska 99501–7741, (907) 257–1139

Albuquerque Area Indian Health Service, 505 Marquette NW., Suite 1502, Albuquerque, New Mexico 87102, (505), 766–1624

Bemidji Area Indian Health Service, 203 Federal Building, Bemidji, Minnesota 56601, (218) 751–7701

Billings Area Indian Health Service, P.O. Box 2143, Billings, Montana 59103, (406) 657–6007

California Area Indian Health Service, 2999 Fulton Avenue, Sacramento, California 95821, (916) 978–4202

Nashville Area Indian Health Service, 1101 Kermit Drive, suite 810, Nashville, Tennessee 37217, (615) 736–5104

Navajo Area Indian Health Service, P.O. Box G, Window Rock, Arizona 86515, (602) 871–8214

Oklahoma City Area Indian Health Service, 215 Dean A. McGee Street, NW., Oklahoma City, Oklahoma 73102, (405) 231–5227

Phoenix Area Indian Health Service, 3738 N. 16th Street, suite A, Phoenix, Arizona 85016, (602) 241–2106

Portland Area Indian Health Service, 1220 S.W. Third Avenue, room 476, Portland, Oregon 97204, (503) 221–2541

Office of Health Program Research and Development, 7900 S. J. Stock Road, Tucson, Arizona 85746, (602) 670–6704

2. The application must be signed and submitted by an individual authorized to act for the applicant and to assume, on behalf of the applicant, the obligations imposed by the terms and conditions of any award.

3. Each application will be reviewed by the Contract Proposal Liaison Officer (CPLO) for completeness, accuracy, and eligibility. All acceptable applications will be subject to a competitive review and evaluation. The Tribal Management Program is not subject to E.O. 12372.

4. All applicants will be notified regarding the status of their applications (approved, approved unfunded, or disapproved) by July 6, 1990. Projects will begin between August 1, 1990, and September 30, 1990.

G. Criteria for Review and Evaluation: Applications will be evaluated in accordance with the program regulations set forth at 42 CFR part 36, subpart H, § 36.106.

1. The program narrative statement must include the following elements:

—Need
—Results or Benefits
—Approach
—Key Personnel
—Adequacy of Management Controls

These headings are defined and clarified in the Program Guidelines, part III, which are contained in the IHS Tribal Management Grant Application Kit.

2. The project period for any proposal will not exceed one year.

H. Preapplications: The IHS encourages all applicants to submit a preapplication, by February 15, 1990, to the appropriate Area Office. The preapplication will be used to: (a) Establish communication between the IHS and the applicant, (b) determine the applicant's eligibility, and (c) determine how well the project can compete with similar projects from others.

Dated: February 13, 1990.

Everett R. Rhoades,

Assistant Surgeon General, Director, Indian Health Service.

[FR Doc. 90–4267 Filed 2–23–90; 8:45 am]

BILLING CODE 4160–16–M

Health and Allied Health Professions Eligibility for Scholarship Consideration Under the Health Professions Preparatory and Pregraduate Scholarship Programs for Indians, and the Indian Health Service Scholarship Program

AGENCY: Indian Health Service (IHS), HHS.

ACTION: Notice of Health and Allied Health Professions which will be Eligible for Scholarship Support under the Indian Health Service Scholarship Program (IHSSP).

SUMMARY: The IHS is publishing a list of health and allied health professions for which support under the various scholarship programs administered by the IHS may be available for the 1990–1991 academic year and possibly beyond. Actual awards will be dependent upon the availability of funds. Awards may be available in health and allied health professional areas not listed pending the availability of funds and dependent upon the availability of qualified applicants in the priority areas. This list will remain in effect until superseded.

DATES: This IHS policy is effective February 26, 1990.

FOR FURTHER INFORMATION: Please address inquiries to Mr. Wesley J. Picciotti, Scholarship Coordinator, Indian Health Service Scholarship Branch, Twinbrook Metro Plaza—Suite 100, 12300 Twinbrook Parkway, Rockville, Maryland 20852; Telephone 301–443–6197. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The Health Professions Preparatory and Pregraduate Scholarship Programs for American Indians and Alaska Natives are authorized by section 103 of the Indian Health Care Improvement Act, Public Law 94–437 as amended by Public Law 96–537, Indian Health Care Amendments of 1980 and Public Law 100–713, Indian Health Care Amendments of 1988. The Indian Health Service Scholarship Program, formerly authorized by section 338I of the Public Health Service Act (42 U.S.C. 254r), is now authorized by section 104 of the Indian Health Care Amendments of 1988, Public Law 100–713. Both programs are intended to encourage American Indians and Alaska Natives to enter the health professions and to assure the availability of Indian health professionals to serve Indians. The list below is based upon the needs of the IHS as well as upon the needs of the American Indians and Alaska Natives for additional service by specific health professions.

Regulations at 42 CFR 36.304 provide that the IHS shall, from time to time, publish a list of health professions eligible for consideration for the award of Health Professions Preparatory and Pregraduate Scholarships for Indians and Health Scholarships. Also, section 104(b)(1) of the Indian Health Care Amendments of 1988, Public Law 100–713, authorizes the determination of specific health professions for which Indian Health Scholarships will be awarded.

Pending the availability of funds, consideration will be given to qualified applicants for scholarship support under the above-named scholarship programs in the following health profession categories:

Priority Categories

Health Professions Preparatory Scholarship Program for Indians. (Priority given in the following manner based on academic level: Sophomore, Freshman).

A. Pre-Engineering.
B. Pre-Medical Technology.
C. Pre-Nursing.
D. Pre-Pharmacy.
E. Pre-Physical Therapy.
F. Pre-Sanitation.

Pre-Graduate Program. (Priority given in the following manner based on academic level: Senior, Junior, Sophomore, Freshman).

A. Pre-Dentistry.
B. Pre-Medicine.

Indian Health Scholarship Program. (Priority given in the following manner based on academic level unless specified: Graduate, Senior, Junior, Sophomore, Freshman).

A. Chemical Dependency Counseling: Masters level only.
B. Clinical Psychology: Ph.D. only.
C. Dental Hygiene: Assocdiate and B.S.
D. Dentistry:
E. Dietician: B.S.
F. Engineering: B.S. Civil, Environmental and Mechanical.
G. Health Education: Masters level only.
H. Health Records: A.R.T. and R.R.T.
I. Medical Technology: B.S.
J. Medical Social Work: Masters level only.
K. Medicine: Allopathic and Osteopathic.
L. Nurse Practitioner: R.N.A., C.N.M. and F.N.P.
M. Nursing: A.D.N., B.S.N. and M.S.N.[1]
N. Optometry:
O. Pharmacy: B.S.
P. Physician Assistant: B.S.
Q. Physical Therapy:
R. Public Health: M.P.H. only. (Applicants must be enrolled or accepted in a school of public health and must have two years of health delivery experience).
S. Public Health Nutrition: Masters only.
T. Radiologic Technology:
U. Sanitarian: B.S. Environmental Health, Environmental Science and Occupational Safety and Health.
Sonography:

Interested individuals are reminded that the list of eligible health and allied health professions is initially effective for the applicants for the 1990–1991 academic year. These priorities will remain in effect until superseded. Applicants for health and allied health professions not on the above priority list will be considered pending the availability of funds and dependent upon the availability of qualified applicants in the priority areas.

The Health Professions Preparatory and Pregraduate Scholarship Program for Indians is listed as No. 13.971 in the OMB Catalog of Federal Domestic Assistance. The Indian Health Scholarship Program is listed as No. 13.972 in the catalog.

Applicants for the Indian Health Scholarship Program are reminded that recipients of this scholarship incur a service obligation. Moreover, this obligation is served at a facility determined by the Director, IHS, with the understanding that IHS primary responsibility is to fill vacancies within IHS and Public Law 93–638 Tribal Health Contractors (Tribal-638), and in particular, IHS and Tribal-638 priority sites. Only after IHS and Tribal-638 vacancies are filled will consideration be given other available options.

Dated: February 16, 1990.

Everett R. Rhoades,

Assistant Surgeon General, Director.

[FR Doc. 90–4268 Filed 2–23–90; 8:45 am]

BILLING CODE 4160–16–M

[1] Note: Priority consideration will be given to Registered Nurses employed by the Indian Health Service; in a program assisted under a contract entered into under the Indian Self-Determination Act; or in a program assisted under Title V of the Indian Health Care Improvement Act.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of a Draft Recovery Plan for the Interior population of the Least Term (Sterna antillarum) for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and public comment period.

SUMMARY: The U.S. Fish and Wildlife Service announces the availability for public review of a draft recovery plan for the interior population of the least term. This breeding shorebird occurs in mid-America in the Mississippi and Rio Grande River Basins from Montana to Texas and from eastern New Mexico and Colorado to Indiana and Louisana. From late April unitl August least term occur primarily on barren or sparsely vegetated riverine sandbars, dike field sandbar islands, sand and gravel pits, and shorelines. The species winters in northern South America. The Service solicits review and comments from the public on this draft plan.

DATES: Comments on the draft recovery plan must be received on or before April 2, 1990, to receive consideration by the Service.

ADDRESSES: Persons wishing to review the draft recovery plan may examine a copy during normal business hours at the following offices: Twin Cities Regional Office, Division of Endangered Species, U.S. Fish and Wildlife Service, Federal Building, Fort Snelling, Twin Cities, Minnesota 55111 (612/725/3276); Denver Regional Office, Division of Endangered Species, U.S. Fish and

Wildlife Service, 134 Union Boulevard, Denver, Colorado 80225, (303/236–7398); Albuquerque Regional Office, Division of Endangered Species, U.S. Fish and Wildlife Service, 500 Gold Avenue SW., Albuquerque, New Mexico 87101–3152, (505/766–3972); Atlanta Regional Office, Division of Endangered Species, U.S. Fish and Wildlife Service, Richard B. Russell Federal Building, 75 Spring Street SW, Atlanta, Georgia 30303, (404/331–3580); Bismarck Field Office, U.S. Fish and Wildlife Service, 1500 Capitol Avenue, Bismarck, North Dakota 58501 (701/255–4481); Pierre Field Office, U.S. Fish and Wildlife Service, Room 227, 35 South Pierre, Pierre, South Dakota 57501, (605/224/8693); Grand Island Field Office, U.S. Fish and Wildlife Service, Second floor, Federal Building, 203 West Second, Grant Island, Nebraska 68801 (308/381–5571); Manhattan Field Office, U.S. Fish and Wildlife Service, Suite E, 315 Houston, Manhattan, Kansas 66502, (913/532–7320); Helena Field Office, U.S. Fish and Wildlife Service, Federal Building and U.S. Counthouse, 301 South Park, Room 464, Helena Montana 59626, (713/229–3681); Tulsa Field Office, U.S Fish and Wildlife Service, 222 South Houston, Suite A, Tulsa, Oklahoma 74127, (918/581–7458); Corpus Christi Field Office, U.S. Fish and Wildlife Service (Corpus Christi State University), 6300 Ocean Drive, Corpus Christi, Texas 78412, (512/888–3346); Fort Worth Field Office, U.S. Fish and Wildlife Service, Fritz Lanham Building, Room 9A33, 819 Taylor Street, Fort Worth, Texas 76102 (817/334–2961); Clear Lake Field Office, U.S. Fish and Wildlife Service, 17629 El Camino Real, Suite 211, Houston, Texas 77058, (713/229–3681); Columbia Field Office, U.S. Fish and Wildlife Service, 608 East Cherry, Columbia, Missouri 65205, (314/875–5374); Marion Field Office, U.S. Fish and Wildlife Service, Rural Route 3, Box 328, Marion, Illinois 62959; (618/997–5491); Jackson Field Office, U.S. Fish and Wildlife Service, Jackson Mall Office Center, 300 Woodrow Wilson Avenue, Suite 316, Jackson, Mississippi 39213, (601/490–4900). Persons wishing to obtain a copy of the draft recovery plan should contact the Twin Cities Regional Office. Written comments and materials regarding the plan should be mailed to the Twin Cities Office. All comments and materials received will be available for public inspection, by appointment, during normal business hours at that office for the duration of the comment period.

FOR FURTHER INFORMATION CONTACT: William F. Harrison, at the above Twin Cities Regional Office address (612/725–3276; FTS 725–3276).

SUPPLEMENTARY INFORMATION:

Background

Restoring endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of the U.S. Fish and Wildlife Service's endangered species program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for conservation of the species, criteria for recognizing the recovery levels for downlisting or delisting them, and initial estimates of times and costs to implement the recovery measures needed.

The Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*) requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act as amended in 1988 requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. The Service and other Federal agencies will also take these comments into account in the course of implementing approved recovery plans.

During the breeding season, the interior population of the least tern (*Sterna antillarum*) occurs on sparsely vegetated reiverine sandbars, dike field sandbar islands, sand and gravel pits, and shorelines in the Mississippi and Rio Grande River Basins from Montana to Texas, and from eastern New Mexico and Colorado to Indiana and Louisiana. Threats to the survival of the least tern include the actual and functional loss of riverine sandbar habitat. Channelization and impoundment of rivers have eliminated nesting habitat. Current census data indicate about 5,000 interior least terns exist rangewide. The recovery plan outlines strategies to protect essential breeding habitat by eliminating or removing current threats, establishing management plans for river corridors and reservoirs, developing public awareness, and implementing educational programs. Successful completion of these actions and the establishment of a stable rangewide population of approximately 6,800 individual birds for a period of 10 years is expected to lead to the removal of the interior population of the least tern from the endangered species list.

Public Comments Solicited

The Service solicits written comments on this recovery plan. All comments received by the date specified above will be considered prior to approval of the plan.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: February 16, 1990.

Marvin Moriarty,

Acting Regional Director.

[FR Doc. 90–4228 Filed 2–23–90; 8:45 am]

BILLING CODE 4310-55-M

Bureau of Land Management

[ID–943–90–4212–13; IDI–25151]

Order Providing for Opening of Public Land, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Opening order.

SUMMARY: This order opens lands received in a private exchange to the land, mining, and mineral leasing laws.

EFFECTIVE DATE: March 26, 1990.

FOR FURTHER INFORMATION CONTACT: Sally Carpenter, BLM, Idaho State Office, 3380 Americana Terrace, Boise, Idaho 83706, 208–334–1720.

1. In an exchange made under the provisions of section 206 of the Act of October 21, 1976, 90 Stat. 2756, 43 U.S.C. 1716, the following described lands have been reconveyed to the United States:

Boise Meridian

T. 47 N., R. 1 E.,
Sec. 15, W½SW¼;
Sec. 21, NE¼NE¼;
Sec. 22, NW¼NW¼.
T. 47 N., R. 2 E.,
Sec. 7, lot 3, SW¼NE¼, NE¼SW¼, and NW¼SE¼.
Sec. 18, lot 4, SE¼SW¼, and S½SE¼.
T. 48 N., R. 2 E.,
Sec. 32, NE¼SE¼ and N½SE¼SE¼.

The areas described aggregate 541.43 acres in Benewah, Kootenai and Shoshone Counties.

2. At 9 a.m. on March 26, 1990, the lands will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on March 26, 1990, shall be considered as simultaneously filed at

that time. Those received thereafter shall be considered in the order of filing.

3. At 9:00 a.m. on March 26, 1990, the lands described in paragraph 1, except for the lands described below, will be opened to location and entry under the United States mining laws and to applications and offers under the mineral leasing laws. Appropriation of any of the lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts. The following described lands will remain closed to mining and mineral leasing:

Boise Meridian

T. 48 N., R. 2 E.,
Sec. 32, NE¼SE¼ and N½SE¼SE¼.

The area described contains 60 acres in Kootenai County.

Dated: February 6, 1990.

William E. Ireland,

Chief, Realty Operations Section.

[FR Doc. 90-4223 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-GG-M

[AZ-010-90-4410-08; 1784-010]

Arizona Strip District Resource Management Plan

AGENCY: Bureau of Land Management, Arizona Strip District, Interior.

ACTION: Notice of Comment Period Extension and Open Houses.

SUMMARY: The Arizona Strip District has extended the public comment period for Arizona Strip District Resource Management Plan and Environmental Impact Statement from March 12, 1990 to April 16, 1990. The following open houses have been scheduled.

Date: March 22, 1990
Location: St. George, Utah
Address: BLM Area Offices, 225 N. Bluff
Time: 2 to 4 p.m. and 7 to 8 p.m.

Date: March 27, 1990
Location: Page, Arizona
Address: John Wesley Powell Memorial Museum, 6 N. Lake Powell Blvd.
Time: 6 to 8 p.m.

Date: March 28, 1990
Location: Flagstaff, Arizona
Address: Adult Center, 245 N. Thorpe Rd. (Adjacent to City Park)
Time: 2 to 4 p.m. and 7 to 8:30 p.m.

Date: March 29, 1990
Location: Phoenix, Arizona
Address: BLM State Office, Rm. 204, 3707 N. 7th Street
Time: 2 to 4 p.m. and 7 to 8:30 p.m.

FOR FURTHER INFORMATION CONTACT: G. William Lamb, District Manager, Arizona Strip District, 390 North 3050 East, St. George, Utah 84770 (Phone 801/673-3545).

SUPPLEMENTARY INFORMATION: The purpose of the open houses is to help clarify the Resource Management Plan by answering questions related to the document.

Dated: February 15, 1990.

G. William Lamb,

Arizona Strip District Manager.

[FR Doc. 90-4214 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-32-M

[NM010-4311-02/GPO-0105]

District Advisory Council Meeting; Albuquerque District, NM

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Albuquerque District Advisory Council Meeting.

SUMMARY: The Bureau of Land Management's Albuquerque District Advisory Council will meet March 30, 1990, in the Albuquerque District Office Conference room located at 435 Montano NE, Albuquerque, New Mexico. The meeting will begin at 10 a.m. and end at approximately 4 p.m.

Topics on the agenda will include updates on current District programs such as the Interior Board of Land Appeals actions on the Molycorp Tailings Disposal EIS, the BLM drought policy, the state BLM roads policy, the Back Country Byways program, and the Anasazi Tribute. The Council will receive an overview of the major issues anticipated in the recently released El Malpais National Conservation Area General Management Plan. The Council will be asked to identify specific issues with the GMP that they would like to explore and develop recommendations for the District Manager.

The meeting is open to the public. Persons wishing to address the Council should contact Alan Hoffmeister, Public Affairs Specialist, 435 Montano NE, Albuquerque, NM 87107, (505) 761-4513.

Robert T. Dale,

District Manager.

[FR Doc. 90-4216 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-84-M

[OR-015-00-4320-02; GPO-129]

Lakeview District Grazing Advisory Board Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice provides the schedule and agenda for a meeting of the Lakeview District Grazing Advisory Board.

DATES: Thursday, March 22, 1990, 10 a.m. until 3 p.m.

ADDRESSES: The meeting will be held at the Bureau of Land Management's Lakeview District Office at 1000 South Ninth, Lakeview, Oregon.

FOR FURTHER INFORMATION CONTACT: Renee Snyder, Bureau of Land Management, P.O. Box 151, Lakeview, OR 97630, (503) 947-6110.

SUPPLEMENTARY INFORMATION: The agenda for the meeting will include:

1. Opening remarks, introductions.
2. Review of 1990 range improvements, allotment evaluations, grazing fees and RPS update.
3. An update on Gerber riparian emphasis area.
4. A briefing on the Final Wilderness EIS.
5. An update on the Warner Wetlands Activity Plan.
6. Planning for the 90s update.
7. Miscellaneous announcements.
8. Public comments.

The meeting will be open to the public. Interested persons may make oral comments during the public comment period or may submit written comments for the Council's consideration. Anyone wishing to make an oral statement must contact the Lakeview District Manager by March 21, 1990.

Judy Ellen Nelson,

District Manager.

[FR Doc. 90-4217 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-33-M

[CA-940-00-5410-10-ZBAU-CACA 26521]

Conveyance of Mineral Interests in California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Segretative Effect-Conveyance of the Reserved Mineral Interests.

SUMMARY: The private lands described in this notice will be examined for suitability for conveyance of the reserved mineral interests pursuant to section 209 of the Federal Land Policy and Management Act of October 21, 1976. The mineral interests will be conveyed in whole or in part upon favorable mineral examination.

FOR FURTHER INFORMATION CONTACT: Joan Mangold, California State Office, 2800 Cottage Way, Room E-2841, Federal Office Building, Sacramento, CA 95825, (916) 978-4820.

The purpose is to allow consolidation of surface and subsurface ownership, for the lands described below, where there are no known mineral values or in those instances where the reservation of ownership of the mineral interests in the United States interferes with or precludes appropriate nonmineral development of the lands and such development would be a more beneficial use of the lands than its mineral development.

San Bernardino Meridian

CACA 26521
T. 1 N., R. 13 E.,
Sec. 32, SE¼NW¼SW¼, SW¼NE¼SW¼, SE¼SW¼, E½NW¼SE¼, S½SE¼;
Sec. 33, S½SW¼.
T. 1 S., R. 13 E.,
Sec. 5, lots 1 and 2.

The area described contains 301.64 acres in Tolumne County. Currently 100 percent of the mineral interest in these lands is owned by the United States.

The application was filed on January 25, 1990. Upon publication of this Notice of Segregative Effect in the Federal Register as provided in 43 CFR 2091.3-1(c) and 2720.1-1(b), the mineral interests owned by the United States in the private lands covered by the application shall be segregated to the extent that they will not be subject to appropriation under public land laws, including the mining laws. The segregative effect the application shall terminate by publication of an opening order in the Federal Register specifying the date and time of opening; or upon issuance of a patent or other document of conveyance to such mineral interests; or upon final rejection of the application; or two years from the date of filing of the application, whichever occurs first.

Dated: February 16, 1990.

Nancy J. Alex,

Chief, Lands Section, Branch of Adjudication and Records.

[FR Doc. 90-4215 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-40-M

[NM-910-GPO-401; NM NM 62205]

Proposed Reinstatement of Terminated Oil and Gas Lease; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Under the provisions of 43 CFR 3108.2-3, Southwest Royalties Inc., petitioned for reinstatement of oil and gas lease NM NM 62205. The land is described as follows:

New Mexico Principal Meridian

T. 12 S., R. 30 E., NMPM
Sec. 19: Lots 3, 4, E½SW¼.
T. 13 S., R. 30 E., NMPM
Sec. 17: SW¼.

The area described aggregates 342.620 acres in Chaves County.

It has been shown to my satisfaction that failure to make timely payments of rental was due to inadvertence.

No valid lease has been issued affecting the lands. Payment of back rentals and administrative cost of $500.00 has been made. Future rentals shall be at the rate of $5.00 per acre per year and royalties shall be at the rate of 16⅔ percent, computed on a sliding scale of 4 percentage points greater than the competitive royalty schedule attached to the lease. Reimbursement for cost of the publication of this notice shall be paid by the lessee

Dated: February 14, 1990

Delores L. Vigil,

Acting Chief, Adjudication Section.

[FR Doc. 90-4218 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-FB-M

[ES-030-00-4212-14; WIES 041993]

Realty Action; Sale of Public Land in Vilas County, Wisconsin

AGENCY: Bureau of Land Management, Interior.

ACTION: Sale of Public Lands in Vilas County, Wisconsin (WIES 041993 in Town of Winchester)—Direct Sale.

SUMMARY: The following public land has been examined and determined to be suitable for sale under section 203(a)(1) of the Federal Land Policy and Management Act (FLPMA) of 1976 (90 Stat. 2750; 43 U.S.C. 1713), at no less than the appraised fair market value shown below:

Fourth Principal Meridian, Wisconsin

WIES 041993
T.43N., R.5E., Section 4
Town of Winchester
Government Lot 10, Lot 24 (0.39 acres)
Appraised Fair Market Value $3,000.00

The land described in hereby segregated from appropriation under the public land laws, including the mining laws, pending disposition of this action or 270 days from the date of publication of this notice, whichever occurs first.

The above described land (WIES 041993) is being offered by direct sale to Richard F. and Violett R. Vrabec. The Patent will be subject to valid existing rights.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, Milwaukee District, P.O. Box 631, Milwaukee, Wisconsin 53201-0631. In the absence of timely objections, this proposal shall become the final determination of the Department of Interior.

FOR FURTHER INFORMATION CONTACT: Detailed information concerning these sales is available at the Milwaukee District Office, Bureau of Land Management, 310 West Wisconsin Avenue, Suite 225, Milwaukee, Wisconsin 53203; or by calling Paulett Francis at 414-297-4416

Leon R. Kabat,

Acting District Manager

[FR Doc. 90-4220 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-GJ-M

[ID-943-90-4212-13; IDI-25151]

Notice of Issuance of Land Exchange Conveyance Document; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Exchage of Public and Private Lands.

SUMMARY: The United States has issued an exchange conveyance document to Idaho Forest Industries, Inc. of Coeur d'Alene, Idaho 83814, for the following-described lands under section 206 of the Federal Land Policy and Management Act of 1976:

Boise Meridian

T. 47 N., R. 2 W.,
Sec. 1, NW¼SW¼;
Sec. 2, lot 4 and NE¼SW¼.
T. 49 N., R. 5 W.,
Sec. 8, SE¼NE¼ and N½SE¼.
Sec. 10, W½NE¼.

Comprising 317.77 acres of public land.

In exchange for these lands, the United States acquired the following-described lands:

Boise Meridian

T. 47 N., R. 1 E.,
Sec. 15, W½SW¼;
Sec. 21 NE¼NE¼;
Sec. 22, NW¼NW¼.
T. 47 N., R. 2 E.,
Sec. 7, lot 3, SW¼NE¼, NE¼SW¼, and NW¼SE¼;
Sec. 18, lot 4, SE¼SW¼, and S½SE¼.
T. 48 N., R. 2 E.,
Sec. 32 NE¼SE¼ and N½SE¼SE¼.

Comprising 541.43 acres of private land.

The purpose of the exchange was to acquire non-federal land which has high public value for water, wildlife, access, recreation, and timber resources and management efficiency. The public interest was well served through completion of this exchange.

The values of the federal public land and the non-federal land in the exchange were both appraised at $515,000 and $515,000, respectively.

Dated: February 16, 1990.

John Davis,

Deputy State Director for Operations.

[FR Doc. 90-4222 Filed 2-23-90; 8:45 am]

BILLING CODE 4310-66-M

INTERSTATE COMMERCE COMMISSION

[Revised I.C.C. Order No. 7]

Rerouting of Traffic

To: All Delaware and Hudson Railway Company connections:

Upon further hearing and consideration, I.C.C. Order No. 7, Rerouting Traffic, is amended to extend its expiration date from 11:59 p.m., February 16, 1990, to 11:59 p.m., February 23, 1990.

It is ordered,

I.C.C. Order No. 7, Rerouting Traffic, is amended by substituting the following paragraph (g) for paragraph (g) thereof:

(g) *Expiration Date.* This order shall expire at 11:59 p.m., February 23, 1990, unless modified, amended or vacated by order of this Commission.

This action is taken pursuant to the authority of 49 U.S.C. 11124.

This order will be served on the Trustee in Bankruptcy and the U.S. District Court for the District of Delaware (Bankruptcy Filing No. 88-3427). This order shall also be served upon the Federal Railroad Administration, the Association of American Railroads, Transportation Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association. Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, DC, and by filing a copy with the Director, Office of the Federal Register.

A copy of this order shall be filed with the Director, Office of the Federal Register.

Decided at Washington, DC, February 16, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley and Emmett. Commissioner Emmett did not participate.

Noreta R. McGee,

Secretary.

[FR Doc. 90-4293 Filed 2-23-90; 8:45 am]

BILLING CODE 7035-01-M

[Service Order No. 1506, Supplemental Order No. 2, Amdt. No. 1]

The New York, Susquehanna and Western Railway Corporation—Lackawanna Valley Railroad Corporation—North Shore Railroad Company—Authorized To Operate Tracks of Delaware and Hudson Railway Company, Debtor, (Francis P. Dicello, Trustee)

AGENCY: Interstate Commerce Commission.

ACTION: Service Order No. 1506, Amendment No. 1 to Supplemental Order No. 2.

SUMMARY: This amendment to Supplemental Order No. 2 amends Service Order No. 1506, by authorizing The New York, Susquehanna and Western Railway Company (NYSW), Lackawanna Valley Railroad Corporation (LVAL), and North Shore Railroad Company (NSHR) to operate without Federal subsidy or compensation over certain tracks of the Delaware and Hudson Railway Company (DH) from 11:59 p.m. on February 16 through 11:59 p.m. on February 23, 1990. We are contemporaneously issuing an order amending I.C.C. Order No. 7, Rerouting Traffic, and denying a petition by Springfield Terminal Railway Company (ST) to operate certain portions of the DH network not included in the NYSW plan.

DATES: *Effective date:* This order shall become effective at 11:59 p.m., February 16, 1990, and shall remain in effect until 11:59 p.m., February 23, 1990.

FOR FURTHER INFORMATION CONTACT: Melvin F. Clemens, Jr., (202) 275-1559 or Bernard Gaillard, (202) 275-7849 [TDD for hearing impaired: (202) 275-1721]

SUPPLEMENTARY INFORMATION: Upon further hearing and consideration of Service Order No. 1506, Supplemental Order No. 2 and good cause appearing therefor:

It is ordered,

The New York, Susquehanna and Western Railway Corporation—Lackawanna Valley Railroad Corporation—North Shore Railroad Company—Authorized to Operate Tracks of Delaware and Hudson Railway Company, Debtor, (Francis P. Dicello, Trustee)

ST's petition to operate certain portions of the DH not included in the NYSW plan is denied.

Supplemental Order No. 2 is amended by substituting the following paragraph (i) for pararaph (i) thereof:

(i) *Expiration date.* The provisions of this order shall expire at 11:59 p.m. on February 23, 1990. In the event the Trustee decides to resume service, the Trustee shall notify the Commission and the interim operator no later than 48 hours prior to such resumption of service.

Effective date. This order shall be effective at 11:59 p.m., February 16, 1990.

This action is taken under authority of 49 U.S.C. 11123(a).

This order will be served on the Trustee in Bankruptcy and the U.S. District Court for the District of Delaware (Bankruptcy Filing No. 88-3427). This order shall also be served upon the Federal Railway Administration, the Association of American Railroads, Transportation Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association. Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, DC, and by filing a copy with the Director, Office of the Federal Register.

Decided: February 16, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Emmett did not participate.

Noreta R. McGee,

Secretary.

[FR Doc. 90-4289 Filed 2-23-90; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

[INS NUMBER: 1258-90]

Changes to Chapter 15 of the United States-Canada; Free-Trade Agreement (FTA)

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice.

SUMMARY: This notice informs the public of proposed changes to Annex 1502.1 to Chapter 15 of the FTA. Public notification complies with the wishes of Congress that any changes or additions to Chapter 15 be announced publicly with time allowed for comment. After the comment period has expired and all comments have been considered, the Immigration and Naturalization Service will publish a regulation incorporating the changes to Annex 1502.1.

DATES: February 26, 1990. Comments must be received by April 27, 1990.

ADDRESSES: Written comments should be mailed in triplicate to R. Michael Miller, Deputy Assistant Commissioner, Adjudication, U.S. Immigration and Naturalization Service, 425 I Street, NW., Washington, DC 20536.

FOR FURTHER INFORMATION CONTACT: Edward Skerrett, Senior Immigration Examiner, U.S. Immigration and Naturalization Service, 425 I Street, NW., Washington, DC 20536, Telephone: (202) 633-3946.

SUPPLEMENTARY INFORMATION: The United States-Canada Free-Trade Agreement (FTA) entered into force on January 1, 1989. Article 1503 of Chapter 15 of the agreement calls for consultation, at least once a year, involving the participation of immigration officials of both countries to develop measures for further facilitating the temporary entry of business persons on a reciprocal basis and to develop amendments and additions to Annex 1502.1 to chapter 15.

To set the required consultative procedure in motion, the immigration agencies of both countries formed a working group to explore and recommend further facilitative measures, as well as amendments and additions to Annex 1502.1. The United States team in the working group was made up of representatives from the U.S. Immigration and Naturalization Service (INS), the Department of State, the Department of Labor, and the Department of Commerce. The Canadian represenatitives to the working group came from Employment/ Immigration Canada (CEIC) and the Department of External Affairs. The working group met several times during 1989. The recommendations of the group, after agency approval, were then signed into agreement for implementation by the United States Trade Representative and the Canadian Minister for International Trade. Amendment of the agreement, however, is subject to the amending procedures of both governments. This notice reflects the amendments on which agreement has been reached and, in accordance with the wishes of Congress, the amendments will not be placed in regulation until time has been allowed for public comment and a final rule has been published.

The proposed changes to Chapter 15 relate only to Annex 1502.1, specifically Schedules 1 and 2. They will be discussed in that order.

Schedule 1 to Annex 1502.1

The original Schedule 1 in the provision for Sale did not clearly indicate that the taking of orders or the negotiating of contracts for goods or services was limited to United States or Canadian citizens taking orders for U.S. or Canadian goods or services in the other country. Some readers of Schedule 1 have construed, for instance, that the sale of U.S. goods or services in the United States by Canadian citizens and vice versa is permissible. It was never the intention during the negotiations on chapter 15 that this should be the case. Although this was assumed by U.S. immigration officials, CEIC was quite specific in its Operations Memorandum tht U.S. sales representatives could not sell Canadian-made goods or Canadian-produced services in Canada. The working group, therefore, proposed that the provision for Sales be amended by adding the words "for an enterprise located in Canada/the United States" to reflect this restriction. The purpose of the restriction is to ensure the protection of indigenous labor and permanent employment in both countries.

The working group also proposed an amendment to the provision for Distribution in Schedule 1 to provide for intermediate pick-up and delivery of passengers by operators of regularly-scheduled motor coaches on routes which were in existence at the time of entry into force of the agreement. From a U.S. perspective, this would be a unique provision within the B-1 nonimmigrant visitor for business classification found only in the FTA and applicable only to Canadian citizens. It would apply equally to U.S.-citizen motor coach operators going into Canada. This provision would alleviate a long-standing problem in the transportation industry and would further facilitate the entry of citizens of both nations in the spirit of the FTA.

Schedule 2 to Annex 1502.1

During the first year of implementation of the FTA, both U.S. and Canadian immigration officials received overtures from interested parties regarding the addition of certain professions to Schedule 2. This notice reflects the professions on which agreement has been reached during the consultative process. Professions or occupations other than those included have been presented for consideration, but common agreement on their addition has not yet been reached by the working group.

The professions proposed for addition to the schedule are astronomer, chemist, geologist, meteorologist, graphic designer, landscape architect, land surveyor, urban planner, occupational therapist, physical therapist, recreational therapist, pharmacist, and apiculturist. The basic requirement for individuals in all these professions will be at least a baccalaureate degree.

The professions of astronomer, chemist, geologist, and meteorologist are proposed for addition because, although they were not included in the original schedule, technicians/technologists in their support were included. Including them now remedies that original oversight.

Representations for the addition of graphic designer, landscape architect, land surveyor, and urban planner came to the working group through CEIC. The professions of occupational therapist, physical therapist, recreational therapist, and pharmacist were brought to the attention of INS by various interested medical groups in the United States. The addition of apiculturist is proposed since it belongs to the class of agricultural scientists, and other professions in that class were included in the original schedule. This proposed revised schedule also reflects one notable deletion—journalist. The requirement for a journalist in the original schedule was a baccalaureate and three years of experience. This requirement caused concern within professional organizations of journalists and publishers on both sides of the border. Interested parties called either for the removal in the schedule of any requirements for journalists or the removal of journalist from the schedule. The working group studied these proposals and recommended that the profession of journalist be removed from Schedule 2. This, of course, in no way

precludes the entry of journalists into either country through existing alternative means.

To qualify as a professional under the schedule, an individual must have a baccalaureate degree, or higher, or appropriate credentials demonstrating status as a professional. The original Schedule 2 was inconsistent in reflecting this requirement. An annotated version of Schedule 2 in INS regulations showed basic professional requirements for some, but not all, of the professions. If not otherwise indicated, a baccalaureate was required. The working group has now agreed that, for clarity, the schedule should show the basic requirements for all the professions in the schedule. There are still five professions (accountant, animal breeder, computer systems analyst, clinical lab technologist, and medical technologist), however, for which the Canadian members of the working group have asked that further study be conducted to determine alternative ways of qualification. This study is being actively pursued, but for the present the basic requirement for the entry of Canadian citizens into the United States in these five professions remains a baccalaureate degree.

Proposed changes to Schedules 1 and 2 to Annex 1502.1 are as follows:

Changes to Schedule 1 to Annex 1502.1

Under Sales, the first item should read:

—Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in Canada/the United States but not delivering goods or providing services.

Under Distribution, between the two current items, add a new item:

—Transportation operators (other than tour or charter motor coach operators) of high-capacity motor coaches delivering passengers on regularly-scheduled routes to the United States/Canada, with or without intermediate loading or delivery of passengers within the United States/Canada. This provision is limited to operators of high-capacity motor coaches on regularly-scheduled routes that were in operation on the date of entry into force of the Agreement.

A high-capacity motor coach is defined as having a gross seating capacity of no less than 40 persons, including the operator.

Changes to Schedule 2 to Annex 1502.1

From the current schedule, remove:

—Journalist (baccalaureate and three years' experience).

To the current schedule, add (added professions and/or qualifying criteria are underlined):

—architect—*baccalaureate degree or state/provincial license*
—dietician—*baccalaureate degree*
—economist—*baccalaureate degree*
—engineer—*baccalaureate degree or state/provincial license*
—forester—*baccalaureate degree*
—*graphic designer—baccalaureate degree*
—*land surveyor—baccalaureate degree or state/provincial/federal license*
—*landscape architect—baccalaureate degree*
—lawyer—*membership in a state/provincial bar, L.L.B., J.D., or L.L.L.*
—librarian—MLS or *baccalaureate degree in Library Science and three years' experience*
—Medical/Allied Professional
  —dentist—*D.D.S., D.M.D., or state/provincial license*
  —*occupational therapist—baccalaureate degree*
  —*pharmacist—baccalaureate degree or state/provincial license*
  —physician (teaching and/or research only)—*M.D., or state/provincial license*
—*physio/physical therapist—baccalaureate degree*
—*recreational therapist—baccalaureate degree*
—registered nurse—state or provincial license
—veterinarian—*D.V.M. or state/provincial license*
—nutritionist—*baccalaureate degree*
—psychologist—*baccalaureate degree*
—range manager (range conservationist)—*baccalaureate degree*
—research assistant (working in a post-secondary educational institution)—*baccalaureate degree*
—scientist
  —agriculturist (agronomist)—*baccalaureate degree*
  —animal scientist—*baccalaureate degree*
  —*apiculturist—baccalaureate degree*
  —*astronomer—baccalaureate degree*
  —biochemist—*baccalaureate degree*
  —biologist—*baccalaureate degree*
  —*chemist—baccalaureate degree*
  —dairy scientist—*baccalaureate degree*
  —entomologist—*baccalaureate degree*
  —epidemiologist—*baccalaureate degree*
  —geneticist—*baccalaureate degree*
  —*geologist—baccalaureate degree*
  —geophysicist—*baccalaureate degree*
  —horticulturist—*baccalaureate degree*
  —*meteorologist—baccalaureate degree*
  —pharmacologist—*baccalaureate degree*
  —physicist—*baccalaureate degree*
  —plant breeder—*baccalaureate degree*
  —poultry scientist—*baccalaureate degree*
  —soil scientist—*baccalaureate degree*
  —zoologist—*baccalaureate degree*
—social worker—*baccalaureate degree*
—sylviculturist (forestry specialist)—*baccalaureate degree*
—teacher
  —college—*baccalaureate degree*
  —university—*baccalaureate degree*
  —seminary—*baccalaureate degree*
  —technical publications writer—*baccalaureate degree*
  —*urban planner—baccalaureate degree*
  —vocational counselor—*baccalaureate degree*

Dated: January 18, 1990.

Richard E. Norton,

Associate Commissioner, Examinations, Immigration and Naturalization Service.

[FR Doc. 90-4254 Filed 2-23-90; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility to Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under title II, chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 12, 1990.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 12, 1990.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street, NW., Washington, DC 20213.

Signed at Washington, DC this 12th day of February 1990.

Marvin M. Fooks,

Trade Adjustment Assistance.

APPENDIX

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Artech Energy (workers)	Boynton, OK	2/12/90	1/25/90	23,964	Oil and gas.
Bohn Engine & Foundry Div. (UAW)	Holland, MI	2/12/90	2/1/90	23,965	Pistons.
Cortelco (company)	Corinth, MS	2/12/90	1/26/90	23,966	Telephone subsets.
Eastman Kodak Co., Inc. (workers)	Windsor, CO	2/12/90	1/22/90	23,967	Film.
Eastern PA. Clothing J.T. Bd., (ACTWU)	Allentown, PA	2/12/90	1/22/90	23,968	Mens' clothes.
Expanding Energy Corp. (workers)	Midland, TX	2/12/90	1/31/90	23,969	Oil and gas.
Etienne Aigner (workers)	Edison, NJ	2/12/90	1/22/90	23,970	Handbags.
Fair Shake Co., Inc. (workers)	Forks, WA	2/12/90	2/1/90	23,971	Shakes and shingles.
Forstmann & Co. (workers)	Tifton, GA	2/12/90	1/25/90	23,972	Yarn and fabrics.
Globe Products Co., Inc. (company)	Clifton, NJ	2/12/90	1/29/90	23,973	Pie fillings.
Haight's Enterprises (company)	Forks, WA	2/12/90	12/16/90	23,974	Shakes and shingles.
Hinchen Bros. Shingle and Shake, Inc. (company).	Forks, WA	2/12/90	1/26/90	23,975	Cedar shakes and shingles.
Industrial Drives (company)	Radford, VA	2/12/90	2/5/90	23,976	AC/DC servo motors and drives.
J & G Shake Co. (company)	Forks, WA	2/12/90	1/26/90	23,977	Shakes and shingles.
J.J. Farra (OPFW)	Brooklyn, NY	2/12/90	1/30/90	23,978	Sleepwear.
Jill Robbins (ILGWU)	New York City, NY	2/12/90	10/5/89	23,979	Dresses.
Jones Shake and Logging Co.	Rockport, WA	2/12/90	2/1/90	23,980	Shakes.
Joseph Corn and Son, Inc. (UFCW)	New York, NY	2/12/90	1/22/90	23,981	Fur garments.
Lawton, Mfg., Co. (workers)	Lawton, OK	2/12/90	1/25/90	23,982	Mens' pants.
Levi Strauss & Co. (workers)	San Antonio, TX	2/12/90	1/26/90	23,983	Mens' pants.
Lignotock Corp. (company)	Mt. Holly, NJ	2/12/90	1/30/90	23,984	Car door panels.
L.P. #2, Inc. (workers)	Forks, WA	2/12/90	1/31/90	23,985	Shakes and shingles.
Operators, Inc. Headquarters (company)	Houston, TX	2/12/90	1/30/90	23,986	Oil and gas.
Operators, Inc. (company)	Bakersfield, CA	2/12/90	1/30/90	23,987	Oil and gas.
Operators, Inc. (company)	Denver, CO	2/12/90	1/30/90	23,988	Oil and gas.
Operators, Inc. (company)	Lafayette, LA	2/12/90	1/30/90	23,989	Oil and gas.
Operators, Inc. (company)	Farmington, NM	2/12/90	1/30/90	23,990	Oil and gas.
Operators, Inc. (company)	Fairfield, ND	2/12/90	1/30/90	23,991	Oil and gas.
Operators, Inc. (company)	Oklahoma City, OK	2/12/90	1/30/90	23,992	Oil and gas.
Operators, Inc. (company)	San Antonio, TX	2/12/90	1/30/90	23,993	Oil and gas.
Owens Rockway Glass Container, Inc. (company).	Ada, OK	2/12/90	1/10/90	23,994	Glass containers.
Penn Metal Fabricators, Inc. (workers)	Ebensburg, PA	2/12/90	1/25/90	23,995	Burner units.
Premium Shingle Co. (company)	Beaver, WA	2/12/90	1/26/90	23,996	Shakes and shingles.
Quadra Oil & Gas, Inc. (workers)	Denver, CO	2/12/90	1/17/90	23,997	Oil and gas.
Sol Duc Shake & Shingles (workers)	Beaver, WA	2/12/90	1/18/90	23,998	Shakes and shingles.
Stanley Woolen Co. (workers)	Uxbridge, MA	2/12/90	1/24/90	23,999	Woolen cloth and yarn.
Stanley Woolen Mill (workers)	Uxbridge, MA	2/12/90	1/24/90	24,000	Woolen cloth and yarn.
Stanley Berroco Div. (workers)	Uxbridge, MA	2/12/90	1/24/90	24,001	Woolen cloth and yarn.
Target Sportswear, Inc. (company)	Clearfield, PA	2/12/90	1/25/90	24,002	Mens' and ladies' clothing.
U.S. Antimony Corp. (workers)	Stanley, ID	2/12/90	1/19/90	24,003	Gold and silver.
Vickers, Inc. (UAW)	Traverse City, MI	2/12/90	1/31/90	24,004	Valves, manifold assemblies.
Vikeship Div. of Viking Penguin, Inc. (workers).	E Rutherford, NJ	2/12/90	1/29/90	24,005	Books.
Walter Dobie & Assoc. (workers)	Lafayette, LA	2/12/90	2/1/90	24,006	Oil and gas.
Weller Embroidery Corp. (workers)	Union City, NJ	2/12/90	1/24/90	24,007	Embroidery.
WLK Properties, Inc. (workers)	Midland, TX	2/12/90	1/26/90	24,008	Crude oil.
WLK Properties, Inc. (workers)	Winters, TX	2/12/90	1/26/90	24,009	Crude oil.
Health-Tex, Inc. (ACTWU)	Cumberland, RI	11/27/89	11/14/89	[1] 23,645	Childrens' clothing.
Cotter Corp. (OCAW)	Golden, CO	9/25/89	9/15/89	[1] 23,415	Uranium ORC.

[1] Reopened.

[FR Doc. 90-4206 Filed 2-23-90; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-23,528]

Hawkins Oil & Gas, Inc.; Tulsa, OK; Dismissal of Application for Reconsideration

Pursuant to 29 CFR 90.18 an application for administrative reconsideration was filed with the Director of the Office of Trade Adjustment Assistance for workers at Hawkins Oil & Gas, Tulsa, Oklahoma. The review indicated that the application contained no new substantial information which would bear importantly on the Department's determination. Therefore, dismissal of the application was issued.

TA-W-23,528; Hawkins Oil & Gas, Incorporated Tulsa, Oklahoma (January 17, 1990)

Signed at Washington, DC, this 16th day of February 1990.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 90-4204 Filed 2-23-90; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-23,685]

Villa Fashion Shenandoah, PA; Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on December 4, 1989 on behalf of workers at Villa Fashions, Shenandoah, Pennsylvania.

The investigation revealed that both Villa Fashions, Shenandoah, Pennsylvania, and the sole manufacturer the company contracted to, Stephen Douglas Limited, New York, New York, are out of business. Villa Fashions closed at the beginning of May 1989 and Stephen Douglas Limited closed at the end of November 1989 and no further information is available to complete the investigation to make a determination for eligibility under section 221 of the Trade Act of 1974. Since no further information is available to complete the investigation, the investigation has been terminated.

Signed at Washington, DC this 2nd day of February 1990.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 90-4205 Filed 2-23-90; 8:45 am]

BILLING CODE 4510-30-M

Pension and Welfare Benefits Administration

[Application No. D-8151] et al.

Proposed Exemptions; Security National Bank & Trust, Norman, Oklahoma, Employees Profit Sharing Plan, et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Pendency, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption.

ADDRESSES: All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Regulations and Interpretations, room N-5671, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Pendency. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefit Programs, U.S. Department of Labor, room N-5507, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of pendency of the exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of pendency are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Security National Bank and Trust Company, Norman, Oklahoma, Employees Profit Sharing Plan (the Plan) Located in Norman, Oklahoma

[Exemption Application No. D-8151]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1, (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed purchase from the Plan of four promissory notes (the Notes) by the Federal Deposit Insurance Corporation (the FDIC), which is the successor in interest to the Security National Bank and Trust Company, Norman, Oklahoma (the Employer), the sponsor of the Plan; provided that all terms of such transaction are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party.

Summary of Facts and Representations

1. The Plan is a terminated defined contribution pension plan with 122 participants as of August 4, 1989. The trustees of the Plan named in the original Plan document (the Security Trustees) were three officers and/or directors of the Employer. The Employer was a federally-chartered bank located in Norman, Oklahoma. The Comptroller of the Currency declared the Employer insolvent on January 8, 1987. On that date, the FDIC was appointed as receiver for the Employer. Subsequent to the failure of the Employer, FDIC assumed responsibility for administration and custody of the Plan assets and acted as Plan trustee from January 8, 1987 to May 19, 1988. A new trust agreement for the Plan was executed on May 19, 1988, at which time The Trust Company of Oklahoma (the New Trustee) was appointed as the new Plan trustee by FDIC. At that time the title and authority with respect to all Plan assets were transferred by FDIC to the New Trustee. The New Trustee represents that it is independent of the Employer and that FDIC no longer has any authority as trustee with respect to Plan assets. The New Trustee is in the process of liquidating all Plan assets to effect a total distribution of assets to the participants and beneficiaries of the Plan.

2. Among the assets of the Plan are the Notes, which the New Trustee desires to sell as soon as possible to enable completion of Plan asset distribution. However, the New Trustee represents that the Notes are not marketable to unrelated purchasers because three of the Notes are non-performing and have been in default for substantial periods. Additionally, the

New Trustee represents that litigation involving the Notes (the Litigation) and investigations by the Department into the Security Trustees' investments of Plan assets in the Notes, each discussed hereinafter, indicate that the Notes constitute imprudent investments. Because of the lack of marketability of the Notes to unrelated purchasers and because the Litigation has been settled with an agreement providing for the FDIC to purchase the Notes from the Plan, the New Trustee and the FDIC are requesting an exemption to permit the sale of the Notes to the FDIC under the terms and conditions described herein.

3. The Notes evidence four loans of Plan funds which the Security Trustees made to unrelated parties between January 10, 1983 and February 15, 1985. The Notes and their histories are described as follows:

(A) On February 15, 1985 the Security Trustees loaned $210,000 from the Plan to Robert and Verna Bailey (the Baileys), who executed a promissory note (the Bailey Note) in that principal amount in favor of the Plan. The Bailey Note provided for repayment over five years with interest at the rate of 14 percent per annum and was secured by a mortgage on commercial real property (the Bailey Property) located in Noble, Oklahoma. The New Trustee represents that the Bailey Note has been in default since January 15, 1987 with a principal balance of $200,338.66. The New Trustee obtained a judgment on behalf of the Plan against the Baileys (the Bailey Judgment) in the amount of $261,976.23. The New Trustee then caused a foreclose of the Property and is pursuing a deficiency judgment against the Baileys. The sheriff's appraisal obtained in connection with the foreclosure valued the Property at $100,000. The Baileys are contesting the deficiency judgment, contending that the sheriff's appraisal was erroneous. According to James W. Hoyt, MAI, a professional real estate appraiser in Oklahoma City, Oklahoma, the Bailey Property had a fair market value of $145,000 as of October 8, 1988. The FDIC represents that it conducted an informal appraisal of the Bailey Property on February 6, 1989 and determined that it had a fair market value of $75,000 on that date. The New Trustee represents that it has determined that collection pursuant to the Bailey Judgment will be costly and time consuming, based on a review of the Baileys' financial statements and the contest by the Baileys of the sheriff's foreclosure valuation. The New Trustee represents that the current fair market value of the Bailey Note is substantially less than $200,000. It is proposed that FDIC will pay the Plan cash in the amount of $222,031.80 for the Bailey Note and the Plan's rights with respect to the Bailey Judgment.

(B) On January 10, 1983 the Security Trustees loaned $22,500 from the Plan to Jay and Roberta Boynton, who executed a promissory note (the Boynton Note) in that principal amount in favor of the Plan. The Boynton Note provided for repayment over five years with interest at the rate of 14 percent per annum and was secured by a mortgage on unimproved real property (the Boynton Property) located in Norman, Oklahoma. The New Trustee represents that the Boynton Note has been in default since August 10, 1986 with an outstanding principal balance of $17,476.36. The New Trustee represents that Jay Boynton's obligations under the Note have been discharged in bankruptcy. However, the New Trustee has obtained a judgment (the Boynton Judgment) on behalf of the Plan against Roberta Boynton for the amount of $17,476.36 plus interest at the rate of 14 percent per annum. In an informal appraisal, the FDIC found that the Property had an estimated fair market value of $9,000 as of February 6, 1989. The New Trustee represents that a foreclosure sale of the Boynton Property is planned but has not occurred and that Roberta Boynton has indicated that she is unable to pay the Boynton Judgment. The New Trustee maintains that collection of the Boynton Judgment would be costly and time-consuming. The New Trustee represents that the current fair market value of the Boynton Note is less than $15,000. It is proposed that the FDIC Receiver will pay the Plan cash in the amount of $22,476.36 for the Boynton Note and the Plan's rights with respect to the Boynton Judgment.

(C) On February 24, 1984 the Security Trustees loaned $152,331.68 to Lee and Shirley Pace, who executed a promissory note (the Pace Note) in favor of the Plan. The Pace Note provided for repayment over eleven months with interest at the rate of 14.25 percent per annum and was secured by a second mortgage on a 40-acre tract of improved real property (the Pace Property) located in Cleveland County, Oklahoma. The New Trustee represents that the Pace Note has been in default since shortly after its execution. The New Trustee represents that Lee Pace's obligations under the Pace Note have been discharged in bankruptcy. The holder of the first mortgage on the Pace Property foreclosed on the Pace Property and the New Trustee represents that it did not bid on the Pace Property on behalf of the Plan at the foreclosure sale because the value of the Pace Property approximately equaled the amount of the first mortgage. On December 8, 1988 the New Trustee obtained a judgment against Shirley Pace in the amount of $226,696.65, including the Pace Note's outstanding principal balance, accrued interest through July 31, 1988, court costs and attorney's fees. The New Trustee represents that it does not appear that Shirley Pace will be able to pay any substantial sums on the Pace Judgment and that the Pace Note is uncollectible and substantially valueless. It is proposed that the FDIC will pay the Plan cash in the amount of $226,696.65 for the Pace Note and the Plan's rights with respect to the Pace Judgment.

(D) On March 1983 the Security Trustees loaned $39,500 from the Plan to Charlotte and Joseph Prechtl, who executed a promissory note (the Prechtl Note) in that principal amount in favor of the Plan. The Prechtl Note was payable over five years with interest at the rate of 13 percent per annum and was secured by a mortgage on a condominium unit (the Prechtl Property) located in Norman, Oklahoma. On December 1, 1986 the Prechtl Note was renegotiated to provide for repayment of the outstanding balance of $36,462.23 over five years, maturing December 1, 1991, with interest at the rate of 10.5 percent per annum. The New Trustees state that the Prechtl Note is a performing asset with an outstanding principal balance of $33,565.46 as of July 10, 1989. The FDIC informally appraised the Prechtl Property on February 6, 1985 to have an estimated fair market value of $35,000. Although the risk of any loss to the Plan from the Prechtl Note appears minimal, the New Trustee desires to include the Prechtl Note among the other Notes purchased by the FDIC in order to simplify the liquidation and distibution of all Plan assets. It is proposed that the FDIC will pay the Plan cash in the amount of $33,246.09 for the Prechtl Note.

4. In 1985 an investigation of the Plan by the Department of Labor (the Department) resulted in a finding that the Security Trustees had violated the fiduciary responsibility provisions of section 404(a)(1) (B) and (C) of the Act by overconcentrating Plan assets in real estate related investments, including the Notes. The Security Trustees agreed to take certain corrective actions which were proposed by the Department with respect to the violations. Pursuant to the Department's proposal, the Security Trustees agreed to make no further real estate related investments until the outstanding balance of such investments constituted less than 30 percent of Plan assets.

5. The Litigation consists of consolidated lawsuits filed by the New Trustee on behalf of the Plan in federal district court against the Security Trustees and the FDIC (*The Trust Company of Oklahoma, Trustee* v. *Creger, et al.*, case no. CIV–88–876–P, U.S. District Court for the Western District of Oklahoma). In the Litigation it is alleged that by investing Plan funds in the Notes the Security Trustees engaged in imprudent investments in violation of section 404(a) of the Act in that, inter alia, they placed a high concentration of Plan assets in the Notes, failed to obtain independent appraisals of the properties securing the Notes, failed to obtain sufficient collateral to secure the Notes and failed to obtain a valid first mortgage on each property securing the Notes. The Litigation also alleges breaches of fiduciary duties by the Security Trustees relating to securities and other Plan assets not involving the Notes. The New Trustee represents that the FDIC was included as a named defendant in the Litigation for reasons which include the following: (1) The FDIC as receiver succeeded to the liability of the Employer, which was a co-fiduciary of the Plan during the Plan's investments in the Notes; and (2) The FDIC failed to take steps to effect recovery and protection of the Plan's investments in the Notes during the period in which FDIC was acting as Plan trustee, from January 8, 1987 to May 19, 1988.

6. The New Trustees represents that its claims on behalf of the Plan against the Security Trustees and FDIC have been resolved in a settlement agreement (the Settlement) in which each party to the Litigation releases all claims and cross-claims relating to the Plan. The terms of the Settlement provide, among other things, for the transfer to FDIC of all the Plan's interests with respect to the Notes and the payment to the Plan by the FDIC of a total of $504,450.90 in cash. The New Trustee represents that in consideration of all factors involving the Notes and the Plan's investments therein, the proposed purchase of the Notes by the FDIC under the terms of the Settlement is in the best interests of the participants and beneficiaries of the Plan.

7. In summary, the applicants represent that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (1) The Plan is terminated and in need of liquidation of all assets, including the Notes, to enable distribution to participants and beneficiaries; (2) The Plan will receive cash for its interests in the Notes in an amount which New Trustee has determined to be not less than the fair market value of the Notes; (3) All of the Notes except one are in arrears and non-performing and the New Trustee represents that it would be costly, with success unlikely, to attempt collection of the deficiencies under the Notes; (4) The New Trustee has determined that under the prevailing circumstances the Notes are not marketable to unrelated purchasers; and (5) The proposed transaction will settle the Litigation in a manner which the New Trustee has determined to be in the best interests of the participants and beneficiaries of the Plan.

FOR FURTHER INFORMATION CONTACT: Ronald Willet of the Department, (202) 523–8881. (This is not a toll-free number.)

Prudential-Bache Securities Inc. (Prudential-Bache) Located in New York, New York

[Application No. D–8145]

Proposed Exemption

I. Transactions

A. Effective November 1, 1985, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A.(1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 of the Act for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.[1]

B. Effective November 1, 1985, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquistion of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.[2] For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1) (i), (iii) and (iv) are met; and

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[1] Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3–21(c).

[2] For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.B.(1) or (2).

C. Effective November 1, 1985, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust; provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.[3]

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. Effective November 1, 1985, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fudiciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(e)(2)(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

II. General Conditions

A. The relief provided under part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Inc. (D&P) or Fitch Investors Service, Inc. (Fitch);

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this exemption:

A. "Certificate" means:

(1) A certificate—

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) That represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) That is issued by and is an obligation of a trust;

with respect to certificates defined in (1) and (2) for which Prudential-Bache or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to "certificates representing an interest in a trust" include certificates denominated as debt which are issued by a trust.

B. "Trust" means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans and obligations secured by shares issued by a cooperative housing association);

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial

[3] In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

real property, (including obligations secured by leasehold interests on commercial real property);

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U);

(e) "Guaranteed governmental mortgage pool certificates," defined in 29 CFR 2510.3–101(i)(2);

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this section B.(1);

(2) Property which had secured any of the obligations described in subsection B.(1);

(3) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are to be made to certificateholders; and

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements with respect to any obligations described in subsection B.(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) The investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's, Moody's, D&P, or Fitch for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. "Underwriter" means:

(1) Prudential-Bache;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Prudential-Bache; or

(3) Any member of an underwriting syndicate or selling group of which Prudential-Bache or a person described in (2) is a manager or co-manager with respect to the certificates.

D. "Sponsor" means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. "Master Servicer" means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. "Subservicer" means an entity which, under the supervision of and on behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. "Servicer" means any entity which services loans contained in the trust, including the master servicer and any sub-servicer.

H. "Trustee" means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. "Insurer" means the insurer or guarantor of, or provider of other credit support for, a trust.

Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. "Obligor" means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. "Excluded Plan" means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. "Restricted Group" with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)–(6) above.

M. "Affiliate" of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. "Sale" includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. "Forward delivery commitment" means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificate from, the other party).

R. "Reasonable compensation" has the same meaning as that term is defined in 29 CFR 2550.408c–2.

S. "Qualified Administrative Fee" means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the

amount of any such fee waived by the servicer.

T. "Qualified Equipment Note Secured By A Lease" means an equipment note:

(a) Which is secured by equipment which is leased;

(b) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(c) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as the trust would have if the equipment note were secured only by the equipment and not the lease.

U. "Qualified Motor Vehicle Lease" means a lease of a motor vehicle where:

(a) The trust holds a security interest in the lease;

(b) The trust holds a security interest in the leased motor vehicle; and

(c) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract.

V. "Pooling and Servicing Agreement" means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

EFFECTIVE DATES: This exemption, if granted, will be effective for transactions occurring on or after November 1, 1985.

Summary of Facts and Representations

1. Prudential-Bache, a Delaware corporation, is an indirect wholly-owned subsidiary of the Prudential Insurance Company of America. Prudential-Bache is a full service securities broker-dealer and investment banking firm. Prudential-Bache provides both retail brokerage services through its retail brokers in the United States and abroad, and financial advisory services to such clients as corporations, governments, governmental agencies and financial institutions. Among the many areas in which Prudential-Bache is involved are securities underwriting, mergers and acquisitions, restructuring, merchant banking, and the structuring and trading of mortgage-backed securities and asset-backed securities as well as unsecuritized mortgage transactions. Through its Capital Markets Group, Prudential-Bache, among other things, engages in securities transactions with institutional investors and others, as both a principal and agent in the listed and over-the-counter markets, as well as in futures and commodities. Prudential-Bache and/or its affiliates act as an investment advisor to closed and open-ended mutual funds. Prudential-Bache has extensive experience in underwriting and trading mortgage-backed securities and asset-backed securities and is a leading underwriter of mortgage-backed securities as measured by industry rankings.

Trust Assets

2. Prudential-Bache seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts; [4] (2) motor vehicle receiveable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.[5]

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the term of such mortgages.

[4] The Department notes that PTE 83-1 [48 FR 895, January 7, 1983], a class exemption for mortgage pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. Prudential-Bache requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, Prudential-Bache has stated that it may still avail itself of the exemptive relief provided by PTE 83-1.

[5] Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts are plan assets.

Trust Structure

4. Each trust is established under a pooling and servicing agreement among a sponsor, a servicer and a trustee. The sponsor or servicer of a trust selects assets to be included in the trust. These assests are receivables which may have been originated by a sponsor or servicer of the trust, an affiliate of the sponsor or servicer, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.

On or prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assests, and the trustee issues certificates representing fractional undivided interests in the trust assets. Prudential-Bache, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. The majority of the public offerings of certificates made to date have been underwritten on a firm commitment basis. In addition, Prudential-Bache has privately placed certificates on both a firm commitment and an agency basis. Prudential-Bache may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders are entitled to receive monthly, quarterly or semi-annual installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable.

When installments or payments are made on a semi-annual basis, funds are not permitted to be commingled with the servicer's assets for longer than would be permitted for a monthly-pay security. A segregated account is established in the name of the trustee (on behalf of certificateholders) to hold funds received between distribution dates. The account is under the sole control of the trustee, who invests the account's assets in short-term securities which have received a rating comparable to the rating assigned to the certificates. In some cases, the servicer may be permitted to make a single deposit into the account once a month. When the servicer makes such monthly deposits, payments received from obligors by the servicer may be commingled with the servicer's assets during the month prior to deposit. In no event will the period of time between receipt of funds by the servicer and deposit of these funds in a segregated account exceed one month.

Furthermore, in those cases where distributions are made semi-annually, the servicer will furnish a report on the operation of the trust to the trustee on a monthly basis. At or about the time this report is delivered to the trustee, it will be made available to certificateholders and delivered to or made available to each rating agency that has rated the certificates.

5. Some of the certificates will be multi-class certificates. Prudential-Bache requests exemptive relief for two types of multi-class certificates: "Strip" certificates and "fast-pay/ slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on receivables is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.[6]

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities or the same maturities with different payment schedules. In the case of classes of securities having different stated maturities, interest and/or principal payments received on the underlying receivables are generally distributed first to the class of certificates having the earliest stated maturity of principal and/or earlier payment schedule, and only when that class of certificates has been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all the certificateholders have been paid in full. The only differences between this multi-class pass-through arrangement and a single-class pass-through arrangement are the order in which distributions are made to certificateholders and the payment schedules of the classes of certificates. Regardless of whether a multi-class or single-class pass-through arrangement is utilized, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing certificates be subordinated to the rights of another certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to certificateholders is less than the amount required to be so distributed, all senior certificateholders then entitled to receive distributions will share in the amount distributed on a pro rata basis.[7]

6. For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for the substitution of receivables by the sponsor only in the event of defects in documentation discovered within a limited time after the issuance of trust certificates. Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable andpassed through the certificateholders.

Parties to Transactions.

7. The originator of a receivable is the entity that initially lends money to a borrower (obligor), such as a homeowner or automobile purchaser, or leases property to the lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivable in the ordinary course of their business, including finance companies, for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service enterprise for whom such origination is an incidential part of its operations. Each trust may contain assets of one or more originators. The originator of the receivables may also function as the trust sponsor or servicer.

8. The sponsor will be one of three entities: (i) A special-purpose corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

9. The trustee of a trust is the legal owner of the obligations in the trust. The trustee is also a party to or beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rigths created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to Prudential-Bache, the trust sponsor or the servicer. Prudential-Bache represents that the trustee will be a substantial financial institution or trust company experienced in trust activities. The trustee receives a fee for its services, which generally will be paid by the sponsor or servicer. In some transactions, however, the trustee's fee is not paid by the sponsor or servicer, but rather is paid out of trust assets. The method of compensating the trustee will be specified in the pooling and servicing agreement and disclosed in the prospectus or private placement memorandum relating to the offering of the certificates.

10. The servicer of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, it is common for the receivables to be "subserviced" by their respective originators and for a single entity to "master service" the pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

In most cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (though they themselves may be related) will be unrelated to Prudential-Bache. In some cases, however, affiliates of Prudential-Bache may originate or

[6] It is the Department's understanding that where a plan invests in REMIC "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of section 404(a)(1)(B) of the Act would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

[7] If a trust issues subordinate certificates, holders of such subordinate certificates may not share in the amount distributed on a pro rata basis. The Department notes that the exemption does not provide relief for plan investment in such subordinated certificates.

service receivables included in a trust, or may sponsor a trust.

Certificate Price, Pass-Through Rate and Fees

11. Where the sponsor of a trust is not the originator of receivables included in a trust, the sponsor generally purchases the receivables in the secondary market, either directly from the originator or from another secondary market participant. The price the sponsor pays for a receivable is determined by competitive market forces, taking into account payment terms, interest rate, quality, and forecasts as to future interest rates.

As compensation for the receivable transferred to the trust, the sponsor receives certificates representing the entire beneficial interest in the trust, or the cash proceeds of the sale of such certificates. If the sponsor receives certificates from the trust, the sponsor sells these certificates for cash to investors or securities underwriters. In some transactions, the sponsor or an affiliate may retain a portion of the certificates for its own account. In addition, in some transactions the originator may sell receivables to a trust for cash. At the time of the sale, the trustee would sell certificates to the public or to underwriters and use the cash proceeds of the sale to pay the originator for the receivables sold to the trust. The transfer of the receivables to the trust by the sponsor, the sale of certificates to investors, and the receipt of the cash proceeds by the sponsor generally take place simultaneously.

12. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificates is equal to the interest rate on receivables included in the trust minus a specified servicing fee.[8] This rate is generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon rate, together determine the yield to investors. If an investor purchases a certificate at less than par, that discount augments the stated pass-through rate; conversely, a certificate purchased at a premium yields less than the stated coupon.

13. As compensation for performing its servicing duties, the servicer (who may also be the sponsor, and receive fees for acting in that capacity) will retain the difference between payments received on the receivables in the trust and payments payable (at the pass-through rate) to certificateholders, except that in some cases a portion of the payments on receivables may be paid to a third party, such as a fee paid to a provider of credit support. The servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer will be required to pay the administrative expenses of servicing the trust, including, in some cases, the trustee's fee, out of its servicing compensation.

The servicer is also compensated to the extend it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is either paid out of the interest income received on the receivables in excess of the pass-through rate or paid in a lump sum at the time the trust is established.

14. The servicer may be entitled to retain certain administrative fees paid by a third party, usually the obligor. These administrative fees fall into three categories: (A) Prepayment fees; (b) late payment and payment extension fees; and (c) fees and charges associated with foreclosure or repossession, or other conversion of a secured position into cash proceeds, upon default of an obligation.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

15. Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest bearing accounts in itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy or receivership. In those instances when payments on receivables are held in non-interest bearing accounts or are commingled with the servicer's own funds, the servicer is required to deposit these payments by a date specified in the pooling and servicing agreement into an account from which the trustee makes payments to certificateholders.

16. Prudential-Bache will receive a fee in connection with the securities underwriting or private placement of certificates. In a firm commitment underwriting, which is usually done in a public offering, this fee would consist of the difference between what Prudential-Bache receives for the certificates that it distributes and what is pays the sponsor for those certificates. In some public offerings, however, Prudential-Bache may sell certificates on an agency basis, in a best efforts underwriting. In those cases, Prudential-Bache would received an agency commission paid by the sponsor. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor.

Purchase or Receivables by the Servicer

17. The applicant represents that as the principal amount of the receivables in a trust is reduced by payment, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase the receivables included in the trust when the aggregate unpaid balance payable on the receivables is reduced to a specified percentage (usually between 5 and 10 percent) of the initial aggregate unpaid balance. The terms of such repurchase are specified in the pooling and servicing agreement.

The purchase price of a receivable is specified in the pooling and servicing agreement and will be either: (1) The unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer; or (2) the greater of (a) the amount in (1), or (b) the fair market value of such obligations in the case of a REMIC, or the fair market value of the certificates in the case of a trust that is not a REMIC.

[8] The pass-through rate on certificates representing interests in trusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

Certificate Ratings

18. The certificates will have received one of the three highest ratings available from either S&P's, Moody's, D&P or Fitch. Insurance or other credit support will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

Provision of Credit Support

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (i.e., act as an insurer). In these cases, the master servicer, in its capacity as servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (a) out of late payments by the obligors, (b) from the credit support provider (which may b itself) or, (c) in the case of a trust that issues subordinated certificates, from amounts otherwise distributable to holders of subordinated certificates, and the master servicer will advance such funds in a timely manner. When the servicer is the provider of the credit support and provides its own funds to cover defaulted payments, it will do so either on the initiative of the trustee, or on its own initiative on behalf of the trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism. In some cases, however, the master servicer may not be obligated to advance funds but instead would be called upon to provide funds to cover defaulted payments to the full exent of its obligations as insurer. Moreover, a master servicer typically can recover advances either from the provider of credit support or from future payments on affected assets.

If the master servicer fails to advance funds, when it is obligated to advance such funds, fails to call upon the credit support mechanism to provide funds to cover defaulted payments, or otherwise fails in its duties, the trustee would be required and would be able to enforce the certificateholders' rights, as both a party to the pooling and servicing agreement and the owner of the trust estate, including rights under the credit support mechanism. Therefore, the trustee, who is independent of the servicer, will have the ultimate right to enforce the credit support arrangement.

When a master servicer advances funds, the amount so advanced in recoverable by the servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, when the master servicer provides credit support to the trust, there are protections in place to guard agains a delay in calling upon the credit support to take advantage of the fact that the credit support declines proportionally with the decrease in the principal amount of the obligations in the trust as payments on receivables are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer to follow its normal servicing guidelines and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (usually monthly, quarterly or semi-annually, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent trustee the amount of all past-due payments and the amount of all servicer advances, along with other current information as to collections on the receivables and draws upon the credit support. Further, the master servicer is required to deliver to the trustee, annually, a certificate of an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such defaulf. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent accountants' review are delivered to the trustee; and

(d) The credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur towards the end of the life of the trust, whether due to servicer advances or any other cause. Once the floor amount has been reached, the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount becomes a fixed dollar amount, subject to reduction only for actual draws. From the time that the floor amount is effective until the end of the life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Indeed, where the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

Disclosure

20. In connection with the original issuance of certificates, the prospectus or private placement memorandum will be furnished to investing plans. The prospectus or private placement memorandum will contain information material to be fiduciary's decision to invest in the certificates, including:

(a) Information concerning the payment terms of the certificates, the rating of the certificates, and any material risk factors with respect to the certificates;

(b) A description of the trust as a legal entity and a description of how the trust was formed by the seller/servicer or other sponsor of the transaction;

(c) Identification of the independent trustee for the trust;

(d) A description of the receivables contained in the trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and

servicing contract and a description of the trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

(h) A general discussion of the principal federal income tax consequences of the purchase, ownership and disposition of the certificates by a typical investor;

(i) A description of the underwriters' plan for distributing the certificates to investors; and

(j) Information about the scope and nature of the secondary market, if any, for the certificates.

21. Reports indicating the amount of payments of principal and interest are provided to certificateholders at least as frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

22. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10–Q and Annual Reports on Form 10–K, many trusts obtain, by application to the Securities and Exchange Commission, a complete exemption from the requirement to file quarterly reports on Form 10–Q and a modification of the disclosure requirements for annual reports on Form 10–K. If such an exemption is obtained, these trusts normally would continue to have the obligation to file current reports on Form 8–K to report material developments concerning the trust and the certificates. While the Securities and Exchange Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the extent required under the Securities Exchange Act of 1934.

23. At or about the time distributions are made to certificateholders, a report will be delivered to the trustee as to the status of the trust and its assets, including underlying obligations. Such report will typically contain information regarding the trust's assets, payments received or collected by the servicer, the amount of prepayments, delinquencies, servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the servicer. Such report also will be delivered to or made available to the rating agency or agencies that have rated the trust's certificates.

In addition, promptly after each distribution date, certificateholders will receive a statement prepared by the trustee summarizing information regarding the trust and its assets. Such statement will include information regarding the trust and its assets, including underlying receivables. Such statement will typically contain information regarding payments and prepayments, delinquencies, the remaining amount of the guaranty or other credit support and a breakdown of payments between principal and interest.

Secondary Market Transactions

24. It is Prudential-Bache's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter, and it is Prudential-Bache's intention to attempt to make a market for any certificates for which Prudential-Bache is lead or co-managing underwriter.

Retroactive Relief

25. Prudential-Bache represents that it has engaged in transactions related to mortgage-backed and asset-backed securities based on the assumption that retroactive relief would not be granted. However, since November 1, 1985, it is possible that some transactions may have occurred that would be prohibited. For example, because many certificates are held in street or nominee name, it is not always possible to identify whether the percentage interest of plans in a trust is or is not "significant" for purposes of the Department's regulation relating to the definition of plan assets (29 CFR 2510.3–101(f)). These problems are compounded as transactions occur in the secondary market. In addition, with respect to the "publicly-offered security" exception contained in that regulation (29 CFR 2510.3–101(b)), it is difficult to determine whether each purchaser of a certificate is independent of all other purchasers.

Summary

26. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The trusts contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's, D&P or Fitch. Credit support will be obtained to the extent necessary to attain the desired rating;

(c) All transactions for which Prudential-Bache seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(d) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(e) Prudential-Bache has made, and anticipates that it will continue to make, a secondary market in certificates.

Discussion of Proposed Exemption

I. Differences between Proposed Exemption and Class Exemption PTE 83–1

The exemptive relief proposed herein is similar to that provided in PTE 81–7 [46 FR 7520, January 23, 1981], Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83–1 (48 FR 895, January 7, 1983).

PTE 83–1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections 406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage pool certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party in interest with respect to the plan, and the continued holding of such certificates, provided that the conditions set forth in the exemption are met. PTE 83–1 also provides exemptive relief from section 406 (b)(1) and (b)(2) of the Act for the above-described transactions when the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transaction by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 83–1 provides conditional exemptive relief from section 406 (a) and (b) of the Act for transactions in connection with

the servicing and operation of the mortgage trust.

Under PTE 83–1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83–1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's Moody's, D&P or Fitch (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more limited section 406(b) and section 407 relief for sales transactions.

II. Ratings of Certificates

After consideration of the representations of the applicant and information provided by S&P's, Moody's, D&P and Fitch, the Department has decided to condition exemptive relief upon the certificates having attained a rating in one of the three highest generic rating categories from S&P's, Moody's, D&P or Fitch. The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables while ensuring that the interests of plans investing in certificates are protected. The Department also believes that the ratings are indicative of the relative safety of investments in trusts containing secured receivables. The Department is conditioning the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at least one year and having been sold to investors other than plans for at least one year.[9]

III. Limited Section 406(b) and Section 407(a) Relief for Sales

Prudential-Bache represents that in some cases a trust sponsor, trustee, servicer, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a pre-existing party in interest with respect to an investing plan.[10] In these cases, a direct or indirect sale of certificates by that party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of the Act.[11] Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, Prudential-Bache represents that a trust sponsor, servicer, trustee, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. Prudential-Bache, represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1), and in some cases section 406(b)(2), of the Act.

Moreover, Prudential-Bache represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor under receivables contained in a trust may be prohibited by sections 406(a) and 407(a) of the Act.

After consideration of the issues involved, the Department has determined to provide the limited section 406(a) and 407(a) relief as specified in the proposed exemption.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 523–8881. (This is not a toll-free number.)

Bear Stearns & Co. Inc. (Bear Stearns), Located in New York, New York

[Application No. D–8207]

Proposed Exemption

I. Transactions

A. Effective September 25, 1989, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan (plan) when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A. (1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.[12]

B. Effective September 25, 1989, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

[9] In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single family residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's, D&P, Fitch or Moody's) and purchased by investors other than plans for at least one year prior to the plan's investment pursuant to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust must have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).

[10] In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which Prudential-Bache or any of its affiliates is either (a) the sole underwriter or manager or comanager of the underwriting syndicate, or (b) a selling or placement agent.

[11] Prudential-Bache represents that where a trust sponsor is a Prudential-Bache affiliate, sales to plans by the sponsor may be exempt under PTE 75–1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if Prudential-Bache is not a fiduciary with respect to plan assets to be invested in certificates.

[12] Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3–21(c).

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

(ii) Solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) Immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.[13] For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1) (i), (iii) and (iv) are met; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.B. (1) or (2).

C. Effective September 25, 1989, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust; provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.[14]

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. Effective September 25, 1989, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of sections 4975(c)(1) (A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14) (F), (G), (H) or (I) of the Act or section 4975(e)(2) (F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

II. General Conditions

A. The relief provided under part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Inc. (D & P) or Fitch Investors Service, Inc. (Fitch);

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of

[13] For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

[14] In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered public offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this exemption:

A. "Certificate" means:

(1) A certificate

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) That represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) That is issued by and is an obligation of a trust; with respect to certificates defined in (1) and (2) for which Bear Stearns or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to "certificates representing an interest in a trust" include certificates denominated as debt which are issued by a trust.

B. "Trust" means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limit to, home equity loans and obligations secured by shares issued by a cooperative housing association);

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property, (including obligations secured by leasehold interests on commercial real property);

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehcile leases (as defined in section III.U);

(e) "Guaranteed governmental mortgage pool certificates," as defined in 29 CFR 2510.3–101(i)(2);

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this section B.(1);

(2) Property which had secured any of the obligations described in subsection B.(1);

(3) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are made to certificateholders; and

(4) Rights of the trustee under the pooling and servicing agreement, and rights under any insurance policies, third-party gurantees, contracts of suretyship and other credit support arrangements with respect to any obligations described in subsection B.(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) The investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's, Moody's, D&P, or Fitch for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. "Underwriter" means:

(1) Bear Stearns;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Bear Stearns; or

(3) Any member of an underwriting syndicate or selling group of which Bear Stearns or a person described in (2) is a manager or co-manager with respect to the certificates.

D. "Sponsor" means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. "Master Servicer" means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. "Subservicer" means an entity which, under the supervision of and on behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. "Servicer" means any entity which services loans contained in the trust, including the master servicer and any subservicer.

H. "Trustee" means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. "Insurer" means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interst in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. "Obligor" means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. "Excluded Plan" means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. "Restricted Group" with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)–(6) above.

M. "Affiliate" of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. "Sale" includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. "Forward delivery commitment" means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificate from, the other party).

R. "Reasonable compensation" has the same meaning as that term is defined in 29 CFR 2550.408c–2.

S. "Qualified Administrative Fee" means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. "Qualified Equipment Note Secured By A Lease" means an equipment note:

(a) Which is secured by equipment which is leased;

(b) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(c) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as the trust would have if the equipment note were secured only by the equipment and not the lease.

U. "Qualified Motor Vehicle Lease" means a lease of a motor vehicle where:

(a) The trust hold a security interest in the lease;

(b) The trust hold a security interest in the leased motor vehicle; and

(c) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract.

V. "Pooling and Servicing Agreement" means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

EFFECTIVE DATE: This exemption, if granted, will be effective for transactions occurring on or after September 25, 1989.

Summary of Facts and Representations

1. Bear Stearns is an international investment banking firm which engages in securities transactions as both a principal and agent and which provides a broad range of underwriting, research and financial services to domestic and foreign financial institutions, corporations, governments, foundations, endowment trusts, insurance companies, investment companies, trust funds, securities dealers, pension funds and individuals. Bear Stearns' Mortgage Finance and Real Estate Departments underwrite and trade a broad range of mortgage-backed securities and mortgage loans, and provide related investment banking services with respect to real estate and housing.

Trust Assets

2. Bear Stearns seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts;[15] (2) motor vehicle receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.[16]

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the term of such mortgages.

Trust Structure

4. Each trust is established under a pooling and servicing agreement between a sponsor, a servicer and a trustee. The sponsor or servicer of a trust selects assets to be included in the trust. These assets are receivables which may have been originated by a sponsor or servicer of the trust, by an affiliate of the sponsor or servicer, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.

Prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. Bear Stearns, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. All of the public offerings or certificates made to date

[15] The Department notes that PTE 83–1 [48 FR 895, January 7, 1983], a class exemption for mortgage pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83–1 are met. Bear Stearns requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, Bear Stearns has stated that it may still avail itself of the exemptive relief provided by PTE 83–1.

[16] Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3–101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts are plan assets.

and all of the public offerings of certificates presently contemplated have been or are to be underwritten on a firm commitment basis. In addition, Bear Stearns has privately placed certificates on both a firm commitment and an agency basis. Bear Stearns may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders are entitled to receive monthly, quarterly or semi-annually installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable.

5. Some of the certificates will be multi-class certificates. Bear Stearns requests exemptive relief for two types of multi-class certificates: "Strip" certificates and "fast-pay/slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on receivables is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.[17]

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities or the same maturities with different payment schedules. In certain transactions of this type, interest and/or principal payments received on the underlying receivables are distributed first to the class of certificates having the earliest stated maturity of principal, and/or earlier payment schedule, and only when that class of certificates have been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all the certificateholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to certificateholders. In each case, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing certificates be subordinated to the rights of another certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to such certificateholders is less than the amount required to be so distributed, all such certificateholders will share in the amount distributed on a pro rata basis.[18]

6. For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for the substitution of receivables by the sponsor only in the event of defects in documentation discovered within a short time after the issuance of trust certificates (within 120 days, except with respect to 30-year obligations, in which case the period may be as long as two years). Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable and passed through to certificateholders.

Parties to Transactions

7. The originator of a receivable is the entity that initially lends money to a borrower (oglibor), such as a homeowner or automobile purchaser, or leases property to the lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivables in the ordinary course of their business, including finance companies, for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service enterprise for whom such origination is an incidental part of its operations. Each trust may contain assets of one or more originators. The originator of the receivables may also function as the trust sponsor or servicer.

8. The sponsor will be one of three entities: (i) A special-purpose corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

9. The trustee of a trust is the legal owner of the obligations in the trust. The trustee is also a party to or beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to Bear Stearns, the trust sponsor or the servicer. Bear Stearns represents that the trustee will be a substantial financial institution or trust company experienced in trust activities. The trustee receives a fee for its services, which will be paid by the servicer, sponsor or the trust as specified in the pooling and servicing agreement. The method of compensating the trustee which is specified in the pooling and servicing agreement will be disclosed in the prospectus or private placement memorandum relating to the offering of the certificates.

10. The servicer of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, it is common for the receivables to be "subserviced" by their respective originators and for a single entity to "master service" the pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

In most cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (though they themselves may be related) will be unrelated to Bear Stearns. In

[17] It is the Department's understanding that where a plan invests in REMIC "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of section 404(a)(1)(B) of the Act would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

[18] If a trust issues subordinated certificates, holders of such subordinated certificates may not share in the amount distributed on a pro rata basis. The Department notes that the exemption does not provide relief for plan investment in such subordinated certificates.

some cases, however, affiliates of Bear Stearns may originate or service receivables included in a trust, or may sponsor a trust.

Certificate Price, Pass-Through Rate and Fees

11. Where the sponsor of a trust is not the originator of receivables included in a trust, the sponsor generally purchases the receivables in the secondary market, either directly from the originator or from another secondary market participant. The price the sponsor pays for a receivable is determined by competitive market forces, taking into account payment terms, interest rate, quality, and forecasts as to future interest rates.

As compensation for the receivables transferred to the trust, the sponsor receives certificates representing the entire beneficial interest in the trust, or the cash proceeds of the sale of such certificates. If the sponsor receives certificates from the trust, the sponsor sells all or a portion of these certificates for cash to investor or securities underwriters. In some transactions, the sponsor or an affiliate may retain a portion of the certificate for its own account. The transfer of the receivables to the trust by the sponsor, the sale of certificates to investors, and the receipt of the cash proceeds by the sponsor generally take place simultaneously.

12. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificates is equal to the interest rate on receivables included in the trust minus a specified servicing fee.[19] This rate is generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon, rate together determine the yield to investors. If an investor purchases a certificate at less than par, that discount augments the stated pass-through rate; conversely, a certificate purchased at a premium yields less than the stated coupon.

[19] The pass-through rate on certificates representing interests in trusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

13. As compensation for performing its servicing duties, the service (who may also be the sponsor, and receive fees for acting in that capacity) will retain the difference between payments received on the receivables in the trust and payments payable (at the pass-through rate) to certificateholders, except that in some cases a portion of the payments on receivables may be paid to a third party, such as a fee paid to a provider of credit support. The service may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer will be required to pay the administrative expenses of servicing the trust, including, in some cases, the trustee's fee, out of its servicing compensation.

The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is either paid out of the interest income received on the receivables in excess of the pass-through rate or paid in a lump sum at the time the trust is established.

14. The servicer may be entitled to retain certain administrative fees paid by a third party, usually the obligor. These administrative fees fall into three categories: (a) Prepayment fees; (b) late payment and payment extension fees; and (c) fees and charges associated with foreclosure or repossession, or other conversion of a secured position into cash proceeds, upon default of an obligation.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

5. Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest bearing accounts in itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy or receivership. In those instances when payments on receivables are held in non-interest bearing accounts or are commingled with the servicer's own funds, the servicer is required to deposit these payments by a date specified in the pooling and servicing agreement into an account from which the trustee makes payments to certificateholders.

16. Bear Stearns will receive a fee in exchange for its services in connection with the securities underwriting or private placement of certificates. In a securities underwriting, this fee would normally consist of the difference between what Bear Stearns receives for the certificates that it distributes and what it pays the sponsor for those certificates. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor.

Purchase of Receivables by the Servicer

17. The applicant represents that as the principal amount of the receivables in a trust is reduced by payment, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase the receivables remaining in the trust when the aggregate unpaid balance on the receivables is reduced to a specified percentage (usually 5 to 10 percent) of the initial aggregate unpaid balance.

The purchase price of the receivables is specified in the pooling and servicing agreement and will be at least equal to the unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer.

Certificate Ratings

18. The certificates will have received one of the three highest ratings available from either S&P's, Moody's, D&P or Fitch. Insurance or other credit support (such as surety bonds, letters of credit, guarantees or the creation of a class of certificates with subordinated cash flow) will be utilized by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

Provision of Credit Support

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust

(i.e. act as an insurer). Typically, in these cases, the master servicer, in its capacity as servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (i) out of late payments by the obligors, (ii) from the credit support provider (which may be itself) or, (iii) in the case of a trust that issues subordinated certificates, from amounts otherwise distributable to holders of subordinated certificates, and the master servicer will advance such funds in a timely manner. In some transactions, the master servicer may not be obligated to advance funds, but instead would be called upon to provide funds to cover defaulted payments to the full extent of its obligations as insurer. When the servicer is the provider of the credit support and provides its own funds to cover defaulted payments, it will do so either on the initiative of the trustee, or on its own initiative on behalf of the trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism.

If the master servicer fails to advance funds, fails to call upon the credit support mechanism to provide funds to cover defaulted payments, or otherwise fails in its duties, the trustee would be required and would be able to enforce the certificateholders' rights, as both a party to the pooling and servicing agreement and the owner of the trust estate, including rights under the credit support mechanism. Therefore, the trustee, who is independent of the servicer, will have the ultimate right to enforce the credit support arrangement.

When a master servicer advances funds, the amount so advanced is recoverable by the servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, where the master servicer provides credit support to the trust, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the credit support declines proportionally with the decrease in the principal amount of the obligations in the trust as payments on receivables are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer to follow its normal servicing guidelines and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (monthly, quarterly or semi-annually, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent trustee the amount of all past-due payments and the amount of all servicer advances, along with other current information as to collections on the receivables and draws upon the credit support. Further, the master servicer is required to deliver to the trustee annually a certificate of an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such default. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent accountants' review are delivered to the trustee;

(d) In cases where the master servicer and the insurer are affiliated or are the same entity, the credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur towards the end of the life of the trust, whether due to servicer advances or any other cause. Once the floor amount has been reached, the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount becomes a fixed dollar amount, subject to reduction only for actual draws. From the time that the floor amount is effective until the end of the life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Ineed, since the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

Disclosure

20. In connection with the original issuance of certificates, the prospectus or private placement memorandum will be furnished to investing plans. The propsectus or private placement memorandum will contain information material to a fiduciary's decision to invest in the certificates, including:

(a) Information concerning the payment terms of the certificates, the rating of the certificates, and any material risk factors with respect to the certificates;

(b) A description of the trust as a legal entity and a description of how the trust was formed by the seller/servicer or other sponsor of the transaction;

(c) Identification of the independent trustee for the trust;

(d) A description of the receivables contained in the trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and servicing contract and a description of the trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

(h) A general discussion of the principal federal income tax consequences of the purchase, ownership and disposition of the pass-through securities by a typical investor;

(i) A description of the underwriters' plan for distributing the pass-through securities to investors; and

(j) Information about the scope and nature of the secondary market, if any, for the certificates.

21. Reports indicating the amount of payments of principal and interest are provided to certificateholders at least as

frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

22. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10–Q and Annual Reports on Form 10–K, many trusts obtain, by application to the Securities and Exchange Commission, a complete exemption from the requirement to file quarterly reports on Form 10–Q and a modification of the disclosure requirements for annual reports on Form 10–K. If such an exemption is obtained, these trusts normally would continue to have the obligation to file current reports on Form 8–K to report material developments concerning the trust and the certificates. While the Securities and Exchange Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the extent required under the Securities Exchange Act of 1934.

23. At or about the time distributions are made to certificateholders, a report will be delivered to the trustee as to the status of the trust and its assets, including underlying obligations. Such report will typically contain information regarding the trust's assets, payments received or collected by the servicer, the amount of prepayments, delinquencies, servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the servicer. Such report also will be delivered to or made available to the rating agency or agencies that have rated the trust's certificates.

In addition, promptly after each distribution date, certificateholders will receive a statement prepared by the trustee summarizing information regarding the trust and its assets. Such statement will include information regarding the trust and its assets, including underlying receivables. Such statement will typically contain information regarding payments and prepayments, delinquencies, the remaining amount of the guaranty or other credit support and a breakdown of payments between principal and interest.

Secondary Market Transactions

24. It is Bear Stearns' normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter, and it is Bear Stearns' intention to attempt to make a market for any certificates for which Bear Stearns is lead or co-managing underwriter.

Retroactive Relief

25. Bear Stearns represents that it has engaged in transactions related to mortgage-backed and asset-backed securities based on the assumption that retroactive relief would securities based on the assumption that retroactive relief would not be granted. However, since September 25, 1989, it is possible that some transactions may have occurred that would be prohibited. For example, because many certificates are held in street or nominee name, it is not always possible to identify whether the percentage interest of plans in a trust is or is not "significant" for purposes of the Department's regulation relating to the definition of plan assets (29 CFR 2510.3–101(f)). These problems are compounded as transactions occur in the secondary market. In addition, with respect to the "publicly-offered security" exception contained in that regulation (29 CFR 2510.3–101(b)), it is difficult to determine whether each purchaser of a certificate is independent of all other purchasers.

Therefore, Bear Stearns requests relief retroactive for transactions which have occurred on or after September 25, 1989, the date Bear Stearns originally filed its exemption application with the Department.

Summary

26. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The trusts contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's, D&P or Fitch. Credit support will be obtained to the extent necessary to attain the desired rating;

(c) All transactions for which Bear Stearns seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(d) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(e) Bear Stearns has made, and anticipates that it will continue to make, a secondary market in certificates.

Discussion of Proposed Exemption

I. Differences between Proposed Exemption and Class Exemption PTE 83–1

The exemptive relief proposed herein is similar to that provided in PTE 81–7 [46 FR 7520, January 23, 1981], Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83–1 [48 FR 895, January 7, 1983].

PTE 83–1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections 406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage pool certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party-in-interest with respect to the plan, and the continued holding of such certificates, provided that the conditions set forth in the exemption are met. PTE 83-1 also provides exemptive relief from section 46(b)(1) and (b)(2) of the Act for the above-described transactions when the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transaction by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 81–1 provides conditional exemptive relief from section 406(a) and (b) of the Act for transactions in connection with the servicing and operation of the mortgage trust.

Under PTE 83–1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments

due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83–1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's, Moody's, D&P or Fitch (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more limited section 406(b) and section 407 relief for sales transactions.

II. Ratings of Certifcates

After consideration of the representations of the applicant and information provided by S&P's, Moody's, D&P and Fitch, the Department has decided to condition exemptive relief upon the certificates having attained a rating in one of the three highest generic rating categories from S&P's, Moody's, D&P or Fitch. The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables while ensuring that the interests of plans investing in certificates are protected. The Department also beieves that the ratings are indicative of the relative safety of investments in trusts containing secured receivables. The Department is conditioning the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at least one year and having been sold to investors other than plans for at least one year.[20]

III. Limited Section 406(b) and Section 407(a) Relief for Sales Bear Stearns represents that in some cases a trust sponsor, trustee, servicer, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a per-existing party in interest with respect to an investing plan.[21] In these cases, a direct or indirect sale or certificates by the party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of the Act.[22] Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, Bear Stearns represents that a trust sponsor, servicer, trustee, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. Bear Stearns, represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1), and in some cases section 406(b)(2), of the Act.

Moreover, Bear Stearns, represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor under receivables contained in a trust may be prohibited by section 406(a) and 407(a) of the Act.

After consideration of the issues involved, the Department has determined to provide the limited sections 406(b) and 407(a) relief as specified in the proposed exemption.

FOR FURTHER INFORMATION: Kay Madsen of the Department, telephone (202) 523–8194. (This is not a toll-free number.)

[20] In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single famly residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's, D&P, Fitch or Moody's) and purchased by investors other than plans for at least one year prior to the plan's investment pursuant to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust prior to the plan's investment in the trust).

[21] In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which Bear Stearns or any of its affiliates is either (a) the sole underwriter or manager or comanager of the underwriting syndicate, or (b) a selling or placement agent.

[22] The applicant represents that where a trust sponsor is an affiliate of Bear Stearns, sales to plans by the sponsor may be exempt under PTE 75–1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if Bear Stearns is not a fiduciary with respect to plan assets to be invested in certificates.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an examption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemption and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispostive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that which application accurately describes all materials terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 20th day of February, 1990.

Ivan Strasfeld,

Director of Exemption Determination, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 90–4203 Filed 2–23–90; 8:45 am]

BILLING CODE 4510–29–M

NATIONAL SCIENCE FOUNDATION

Materials Submitted for OMB Review

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting this notice of information collection that will affect the public.

Agency Clearance Officer: Herman G. Fleming, (202) 357–7335. Written comments to: Division of Personnel and Management, National Science Foundation, 1800 G St. NW., Washington, DC 20550.

OMB Desk Officer: Written comments to: Office of Information and Regulatory Affairs, Attn: Jim Houser, Desk Officer, OMB 722 Jackson Place, room 3208, NEOB, Washington, DC 20503.

Title: Survey of National Science Foundation Reviewers.

Affected Public: Individuals.

Responses/Burden Hours: 8,400 respondents; 30 minutes each response.

Abstract: The National Science Foundation's proposal review system requires the use of qualified members of the research and education communities to judge the quality of researchers' proposals and ideas. This survey will generate a description of the characteristics of the reviewer community and obtain reliable data on controversial matters, such as: Personal biases of reviewers, difficulty of reviewing "risky proposals", and treatment of interdisciplinary research areas.

Dated: February 20, 1990.

Herman G. Fleming,

NSF Clearance Officer.

[FR Doc. 90–4235 Filed 2–23–90; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–295 and 50–304]

Commonwealth Edison Co.; Withdrawal of Application for Amendment to Facility Operating License

The United States Nuclear Regulatory Commission (the Commission) has granted the request of Commonwealth Edison Company (the licensee) to withdraw its application dated February 21, 1986, as supplemented September 25, September 29, and November 21, 1989, for proposed amendment to Facility Operating License Nos. DPR–39 and DPR–48 for the Zion Station, Units 1 and 2, located in Lake County, Illinois.

The proposed amendment would have revised the Technical Specifications for Zion Station to impose restrictions on Containment purge and vent operations.

The Commission has previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on December 15, 1989 (54 FR 51519). However, by letter dated January 23, 1990, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated February 21, 1986, as supplemented September 25, September 29, and November 21, 1989, and the licensee's letter dated January 23, 1990, which withdrew the application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, 2121 L Street, NW., Washington, DC, and the Local Public Document Room located at Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

Dated at Rockville, Maryland, this 14th day of February 1990.

For the Nuclear Regulatory Commission.

Chandu P. Patel,

Project Manager, Project Directorate III–2, Division of Reactor Projects III–IV, V and Special Project, Office of Nuclear Reactor Regulation.

[FR Doc. 90–4281 Filed 2–23–90; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 72–2 (50–280 and –281)]

Virginia Electric and Power Co.; Issuance of Amendment to Materials License SNM–2501

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 3 to Materials License No. SNM–2501 held by the Virginia Electric and Power Company (VEPCO) for the receipt and storage of spent fuel at the Surry Independent Spent Fuel Storage Installation, located on the Surry Power Station site, Surry County, Virginia. The amendment is effective as of the date of issuance.

The amendment revises Technical Specifications to update a reference to VEPCO's Quality Assurance Program, to clarify cask average surface dose rates, and to add specifications for the use of the Westinghouse MC–10 spent fuel storage cask. Administrative changes have been made throughout the license to reflect the latest change to 10 CFR part 72 (53 FR 31651) and to facilitate future amendments for other storage cask designs.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment. Prior public notice of the amendment was not required since the amendment does not involve a significant hazards consideration.

The Commission has determined that the issuance of the amendment will not result in any significant environmental impact and that, pursuant to 10 CFR 51.22(c)(11), an environmental assessment need not be prepared in connection with issuance of the amendment.

For further details with respect to this action, see (1) the application for amendment dated January 13, 1989, and (2) Amendment No. 3 to Materials License No. SNM–2501, and (3) the Commission's letter to the licensee dated February 15, 1990. All of these items are available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC., and at the Local Public Document Room at the Swem Library, College of William and Mary, Williamsburg, Virginia, 23185.

Dated at Rockville, Maryland, this 15th day of February 1990.

For the U.S. Nuclear Regulatory Commission.

Charles J. Haughney,

Chief, Fuel Cycle Safety Branch, Division of Industrial and Medical Nuclear Safety, NMSS.

[FR Doc. 90–4282 Filed 2–23–90; 8:45 am]

BILLING CODE 7590–01–M

Docket No. 50–341

Detroit Edison Company; Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 50 to Facility Operating License No. NPF–43 issued to Detroit Edison Company, which revised the Operating License for operation of the Fermi–2 facility located in Monroe County, Michigan.

The amendment is effective as of the date of issuance.

The admendment revised the Operating License to reflect the purchase by Detroit Edison Company (DECo) of the Wolverine Power Supply Cooperative, Inc.'s ownership in Fermi–2.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act

of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** on November 1, 1989 (54 FDR 46145). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of this amendment will not have a significant effect on the quality of the human environment.

For further details with respect to the action see (1) The application for amendment dated July 14, 1989, (2) Amendment No. 50 to License No. NPF–43, and (3) the Commission's related Safety Evaluation and Environmental Assessment. All of these items are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC., and at the Monroe County Library System, 3700 South Custer Road, Monroe Michigan 48161. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects III, IV, V & Special Projects.

Dated at Rockville, Maryland this 16th day of February, 1990.

For the Nuclear Regulator Commission.

Patricia L. Eng,

Project Manager, Project Directorate III–1 Division of Reactor Projects—III, IV, V & Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 90–4284 Filed 2–23–90; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–289]

Metropolitan Edison Co. et al.; Environmental Assessment and Finding of No Significant Impact

In the matter of Metropolitan Edison Company, Jersey Central Power & Light Company, Pennsylvania Electric Company, GPU Nuclear Corporation, Three Mile Island Unit 1.

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from the requirements of section III.O of appendix R to 10 CFR part 50 of GPU Nuclear Corporation, (the licensee) for the Three Mile Island Nuclear Station, Unit 1 (TMI–1), located at the licensee's site in Dauphin County, Pennsylvania.

Environmental Assessment

Identification of Proposed Action

The licensee is requesting an exemption from the requirements of section III.O of 10 CFR part 50, appendix R, "Oil Collection System for Reactor Coolant Pump." The exemption would allow not having a lube oil collection system (for spills and leakage) beneath certain sections of new piping in the reactor coolant pump (RCP) oil system. The licensee's request and bases for exemption are contained in letter dated October 20, 1989.

The Need for the Proposed Action

The proposed exemption is needed because the features described in the licensee's request regarding the existing and proposed fire protection at the plant for this item are the most practical method for meeting the intent of appendix R and literal compliance would not significantly enhance the fire protection capability. The exemption request arises from a proposed piping modification in the RCP motor lube oil fill system that will result in a decrease in occupational radiation exposure and an increased margin in occupational safety when adding oil to this system.

Environmental impacts of the Proposed Action

The proposed exemption will provide a degree of fire protection such that there is no increase in the risk of fires at this facility. Although literal interpretation of section III.O of appendix R would require an oil collection system to completely encompass the RCP lube oil system piping, it is not practical in this case to completely encompass all sections of new piping added as a result of the proposed modification. The licensee has proposed compensatory measures, both in the design of the piping modification and in operating procedures. Consequently, the probability of fires has not been increased and the potential post-fire radiological releases will not be greater than previously determined nor does the proposed exemption otherwise affect radiological plant effluents. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed exemption.

With regard to potential nonradiological impacts, the proposed exemption involves features located within the restricted area as defined in 10 CFR part 20. It does not affect nonradiological plant effluents and has no other environmental impacts. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed exemption.

Alternative to the Proposed Action

It has been concluded that there is no measureable impact associated with the proposed exemption; any alternatives to the exemption will have either no environmental impact or greater environmental impact.

Alternative Use of Resources

This action involves no use of resources not previoulsy considered in the Final Environmental Statement for the Three Mile Island Nuclear Station, Unit 1.

Agencies and Person Consulted

The NRC staff reviewed the licencees's request and did not consult other agencies or persons.

Finding of No Significant Impact

Based upon the foregoing environmental assessment, the Commission concluded that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed exemption.

For further details with respect to this action, see the request for exemption dated October 20, 1989, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555 and at the Government Publications Section, State Library of Pennsylvania, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, Pennsylvania 17105.

Dated at Rockville, Maryland, this 21st day of February 1990.

For the Nuclear Regulatory Commission.

John F. Stolz,

Director, Project Directorate I–4, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 90–4283 Filed 2–23–90; 8:45 am]

BILLING CODE 7590–01–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

U.S.-Czechoslovakia Trade and Investment Agreements

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Request for written comments by March 16 in connection with the negotiation of trade and investment agreements with Czechoslovakia.

SUMMARY: The Trade Policy Staff Committee (TPSC) is seeking the views of interested parties in connection with the negotiation of trade and investment agreements with Czechoslovakia. The TPSC invites written comments which address (1) the economic impact of granting most-favored-nation (MFN) treatment to products from Czechoslovakia, and (2) problems encountered or anticipated by U.S. entities in conducting trade and investment activities in Czechoslovakia or with Czechoslovakia enterprises.

FOR FURTHER INFORMATION CONTACT: Richard Steinberg, Office of the General Counsel, USTR, on (202) 395–6800 or Michael Brownrigg, Office of Europe and the Mediterranean, USTR, on (202) 395–3211.

SUPPLEMENTARY INFORMATION:

I. General

President Bush announced February 20, 1990, that he has granted a waiver for Czechoslovakia of the Jackson-Vanik amendment to Title IV of the 1974 Trade Act, paving the way for reciprocal status upon conclusion of a U.S.-Czechoslovak trade agreement. The U.S. has also made clear its interest in discussions of an investment agreement with Czechoslovakia. The TPSC is therefore seeking the views of all interested parties concerning the negotiation of such agreements.

II. Written Comments

Written comments are invited on (1) the economic impact of granting MFN treatment (i.e., column 1 rates of duty) to products from Czechoslovakia, and (2) problems encountered or anticipated by U.S. entities in conducting trade and investment activities in Czechoslovakia.

All comments should be submitted in 30 copies, by noon, Friday, March 16, 1990, to Carolyn Frank, Secretary TPSC, room 523, 600 Seventeenth Street NW., Washington, DC 20506.

Any submissions which include business confidential material must be clearly marked as such on the cover page (or letter) and succeeding pages. Such submissions must be accompanied by a nonconfidential summary. Nonconfidential information received will be available for public inspection by appointment in the USTR Reading Room, 600 Seventeenth Street NW., room 101, Washington, DC, Monday through Friday, 10 a.m. to 12 noon and 1 p.m. to 4 p.m. For an appointment call Brenda Webb on (202) 395–6186.

David A. Weiss,

Chairman, Trade Policy Staff Committee.

[FR Doc. 90–4441 Filed 2–22–90; 2:04 pm]

BILLING CODE 3190–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–27714; File No. SR–PSE–90–08]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by Pacific Stock Exchange, Inc. Relating to Constitutional Amendments To Add a Fourth Public Governor to the Board of Governors

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on February 5, 1990, the Pacific Stock Exchange Incorporated ("PSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PSE, pursuant to Rule 19b–4 of the Act, submitted a proposed rule change to amend article II, section 1(a), and article III, section 2(a) of the PSE Constitution to add one more public governor to the Board of Governors. The Exchange proposed the following amendments to its Constitution: [1]

Constitutional Amendment

Article II, Section 2(a)

Board of Governors

The government of the Exchange shall be vested in a Board of Governors (herein sometimes called "the Board") consisting of [sixteen] seventeen elected Governors, [and] the Chairman of the Board, and the President of the Exchange provided that [three] four of the elected Governors shall be representatives of the public and shall not be, or be affiliated with, a broker or dealer in securities * * *

Article III, Section 2(a)

Annual Election of Governors

The elected Governors shall be divided into three classes, [two] one of which shall be composed of five Governors, and [one] two of which shall be composed of six Governors. The [five] six Governors composing Class I shall have terms expiring at the Annual Meeting in 1984, and the terms of Governors in Class I shall expire each three years thereafter. The five Governors composing Class II shall have terms expiring at the Annual Meeting in 1985, and the terms of Governors in Class II shall expire each three years thereafter * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to amend the PSE Constitution in order to add a fourth public Governor to the PSE Board of Governors. This will increase the total number of elected Governors from sixteen (16) to seventeen (17). The Board of Governors approved this measure at their September 28, 1989 meeting.

In approving this constitutional amendment, the Board considered the major contributions of the existing three (3) public Governors, and their increased time commitment to Exchange matters. The Board noted that the public Governors bring expertise in areas other than securities to the Exchange, for example, technology, finance, and banking. Most significantly, the public Governors represent the impartial interest of the public.

The Exchange currently has comparatively small percentage of

[1] Italics indicates additions, brackets indicate deletions from the language. The remaining provisions of sections 1(a) and 2(a) are unchanged.

public governors. For example, 12 directors out of 24 on the New York Stock Exchange Board are public directors; 12 governors out of 24 on the American Stock Exchange Board are public governors; 8 governors out of 24 on the Midwest Stock Exchange Board are public governors.[2]

The proposed rule change is consistent with section 6(b)(5) of the Act in that it will enhance protection of investors and the public interest.

B. Self-Regulatory Organization's Statement of Burden on Competition

PSE does not believe that the proposed rule change imposes a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The constitutional amendments were approved by the PSE's Board of Governors on September 28, 1989, and were approved by the PSE members at their Annual Meeting on January 25, 1990 in accordance with article XVII of the PSE Constitution.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change is concerned solely with the administration of the PSE, it has become effective upon filing pursuant to section 19(b)(3) of the Act and subparagraph (e) of Securities Exchange Act Rule 19b–4. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission and all written communications relating to the proposed rule change between the Commission and any persons, other than those that may be withheld from the public in accordance with the provision of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filings will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR–PSE–90–08 and should be submitted by March 20, 1990.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: February 20, 1990.

Jonathan G. Katz,

Secretary.

[FR Doc. 90–4285 Filed 2–23–90; 8:45 am]

BILLING CODE 8010–01–M

[2] This calculation of the total number of governors/directors excludes the Chairman, Presidents, or Vice Presidents.

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Meetings of Pipeline Safety Advisory Committees

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, U.S.C. App. 1), notice is hereby given of the following meetings of the Technical Pipeline Safety Standards Committee and the Technical Hazardous Liquid Pipeline Safety Standards Committee. Each meeting will be in Room 3200–3204 of the Department of Transportation Building, 400 Seventh Street, SW., Washington, DC 20590.

On Wednesday, April 4, 1990, at 9 a.m. the Technical Pipeline Safety Standards Committee will informally discuss the following agenda, which includes topics that are the subject of either scheduled rulemakings (1–4) or studies required by Congress (5,6):

1. Hydrogen sulfide in gas pipelines
2. Gas pipelines operating above 72 percent of SMYS
3. Leakage surveys
4. State adoption of one-call notification systems
5. Study of emergency flow restriction devices
6. Study of the feasibility of DOT regulating excavators

On Thursday, April 5, 1990, at 9 a.m. the Technical Hazardous Liquid Pipeline Safety Standards Committee will informally discuss the following agenda, which includes topics that are the subject of either scheduled rulemakings (1–4) or studies required by Congress (5,6):

1. Hydrostatic testing of certain hazardous liquid pipelines
2. Atmospheric corrosion
3. Design and construction of welded breakout tanks
4. State adoption of one-call notification systems
5. Study of emergency flow restriction devices
6. Study of the feasibility of DOT regulating excavators

Each meeting will be open to the public, but attendance will be limited to the space available. With approval of the Executive Director of the Committees, members of the public may present oral statements on the subjects. Due to the limited time available, each person who wants to make an oral statement must notify Rebecca Key, room 8417, Department of Transportation Building, 400 Seventh Street, SW., Washington, DC 20590, telephone (202) 366–2392, not later than Friday, March 30, 1990, of the topics to be addressed and the time requested to address each topic. The presiding officer may deny any request to present an oral statement and may limit the time of any oral presentation. Members of the public may present written statements to the committees before or after any meeting.

Dated: Feburary 21, 1990.

Cesar De Leon,

Executive Director, Technical Pipeline Safety Standards Committee and Technical Hazardous Liquid Pipeline Safety Standards Committee.

[FR Doc. 90–4248 Filed 2–23–90; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF THE TREASURY

Office of the Secretary

[Department Circular—Public Debt Series—No. 6–90]

Treasury Notes of February 29, 1992, Series W–1992

Washington, February 15, 1990.

1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of chapter 31 of title 31, United States Code, invites tenders for approximately $10,000,000,000 of United States securities, designated Treasury Notes of February 29, 1992, Series W–1992 (CUSIP No. 912827 YP 1), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be

determined in the manner described below. Additional amounts of the Notes may be issued to Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

2. Description of Securities

2.1. The Notes will be dated February 28, 1990, and will accrue interest from that date, payable on a semiannual basis on August 31, 1990, February 28, 1991, August 31, 1991, and February 29, 1992. They will mature February 29, 1992, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in denominations of $5,000, $10,000, $100,000, and $1,000,000, and in multiples of those amounts. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the Treasury Direct Book-Entry Securities System in Department of the Treasury Circular, Public Debt Series, No. 2–86 (31 CFR part 357), apply to the Notes offered in this circular.

3. Sales Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239–1500, prior to 1:00 p.m., Eastern Standard time, Wednesday, February 21, 1990. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, February 20, 1990, and received no later than Wednesday, February 28, 1990.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is $5,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than $1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions: primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; and Federal Reserve Banks. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a ⅛ of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.500. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting non-competitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in § 3.5. must be made or completed on or before Wednesday, February 28, 1990. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury;

in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Monday, February 26, 1990. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in Treasury Direct are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in Treasury Direct must be completed to show all the information required thereon, or the Treasury Direct account number previously obtained.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may, at any time, supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 90-4380 Filed 2-22-90; 10:16 am]

BILLING CODE 4810-40-M

[Department Circular—Public Debt Series—No. 7-90]

Treasury Notes of May 15, 1995, Series K-1995

Washington, February 15, 1990.

1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of Chapter 31 of Title 31, United States Code, invites tenders for approximately $8,000,000,000 of United States securities, designated Treasury Notes of May 15, 1995, Series K-1995 (CUSIP No. 912827 YQ 9), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes may be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

2. Description of Securities

2.1. The Notes will be dated March 1, 1990, and will accrue interest from that date, payable on a semiannual basis on November 15, 1990, and each subsequent 6 months on May 15 and November 15 thorugh the date that the principal becomes payable. They will mature May 15, 1995, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any posession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal Taxes.

2.4. The Notes will be issued only in book-entry form in denominations of $1,000, $5,000, $10,000, $100,000, and $1,000,000, and in multiples of those amounts. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regualtions governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the Treasury Direct Book-Entry Securities System in Department of the Treasury Circular, Public Debt Series, No. 2-86 (31 CFR part 357), apply to the Notes offered in this circular.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, DC 20239-1500, prior to 1:00 p.m., Eastern Standard time, Thursday, February 22, 1990. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Wednesday, February 21, 1990, and received no later than Thursday, March 1, 1990.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is $1,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than $1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5 Tenders for their own account will be received without deposit from commercial banks ano other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds;

international organziations in which the United States holds membership; foreign central banks and foreign states; and Federal Reserve Banks. Tenders from all other must be accompanied by full payment for the amount of Notes applies for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a ⅛ of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 98.750. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting non-competitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this section is final.

5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in § 3.5. must be made or completed on or before Thursday, March 1, 1990. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Tuesday, February 27, 1990. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in Treasury Direct are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes alloted in Treasury Direct must be completed to show all the information required thereon, or the Treasury Direct account number previously obtained.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may, at any time, supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Gerald Murphy,

Fiscal Assistant Secretary.

[FR Doc. 90-4381 Filed 2-22-90; 10:16 am]

BILLING CODE 4810-40-M

DEPARTMENT OF VETERANS AFFAIRS

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) the agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department form number(s), if applicable; (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6) who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Pub. L. 96-511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420 (202) 233-2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395-7316. Please do not send applications for benefits to the above addresses.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before March 28, 1990.

Dated: February 2, 1990.
By direction of the Secretary.

Mark S. Russell,

Acting Director, Office of Information Management and Statistics.

Extension

1. Veterans Benefits Administration.
2. Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Progress or Conduct.
3. VA Form 22–8873.
4. This form is used to request information to evaluate the suitability of a training program and/or information regarding unsatisfactory progress or conduct in training. This information is used to make determinations prior to authorization of benefit payment.
5. On occasion.
6. Individuals or households.
7. 22,000 responses.
8. ½ hour.
9. Not applicable.

[FR Doc. 90–4237 Filed 2–23–90; 8:45 am]

BILLING CODE 8320–01–M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) the agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department, form number(s), if applicable; (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6) who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Public Law 96–511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW, Washington, DC 20503, (202) 395–7316. Please do not send applications for benefits to the above addresses.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before March 28, 1990.

Dated: February 5, 1990.

By direction of the Secretary.

Mark S. Russel,

Acting Director, Office of Information Management and Statistics.

Extension

1. Veterans Benefits Administration.
2. Certification of Lessons Completed.
3. VA Form 22–6553b.
4. This form is issued to veterans and other eligible persons authorized to receive educational benefits for the pursuit of approved correspondence courses. Benefits are authorized quarterly based upon the number of correspondence lessons completed by the student and serviced by the correspondence school.
5. Quarterly.
6. Individuals or households, and Small businesses or organizations.
7. 4,962 responses.
8. 1/6 hour.
9. Not applicable.

[FR Doc. 90–4238 Filed 2–23–90; 8:45 am]

BILLING CODE 8320–01–M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department form number(s), if applicable; (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6) who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Public Law 96–511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, (202) 395–7316. Please do not send applications for benefits to the above addressees.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before March 28, 1990.

Dated: February 2, 1990.

By direction of the Secretary.

Mark S. Russell,

Acting Director, Office of Information Management and Statistics.

New Collection

1. Veterans Benefits Administration.
2. Veterans Mortgage Life Insurance Health Statement.
3. VA Form 29–0562.
4. This form will allow the Department of Veterans Affairs (VA) to obtain health information from veterans applying for Veterans Mortgage Life Insurance (VMLI). The information obtained would be used to determine if the veteran meets the health requirements necessary for granting VMLI.
5. On occasion.
6. Individuals or households.
7. 240 responses.
8. 1/12 hour.
9. Not applicable.

[FR Doc. 90–4239 Filed 2–23–90; 8:45 am]

BILLING CODE 8320–01–M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) the agency responsible for sponsoring the information collection; (2) the title of the information collection; (3) the Department form number (s), if

applicable, (4) a description of the need and its use; (5) frequency of the information collection, if applicable; (6) who will be required or asked to respond; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to complete the information collection; and (9) an indication of whether section 3504(h) of Public Law 96–511 applies.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Veterans Benefits Administration, (203C), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233–2744.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, (202) 395–7316. Please do not send applications for benefits to the above addresses.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before March 28, 1990.

Dated: February 2, 1990.

By direction of the Secretary.

Mark S. Russell,

Acting Director, Office of Information Management and Statistics.

New Collection

1. Veterans Benefits Administration.
2. Medical Information for Reinstatement.
3. VA Form Letter 29–762.
4. This form letter is used by veterans' attending physicians to supply medical information that is required to determine eligibility for reinstatement of insurance and/or total disability income provisions.
5. On occasion.
6. Individuals or households.
7. 480 responses.
8. ½ hour.
9. Not applicable.

[FR Doc. 90–4240 Filed 2–23–90; 8:45 am]

BILLING CODE 8320–01–M

Merit Review Boards (14); Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that the Department of Veterans Affairs 14 Merit Review Boards have been renewed for two years beginning February 2, 1990 through February 1, 1992.

Dated: February 6, 1990.

By direction of the Secretary.

Sylvia Chavez Long,

Committee Management Officer.

[FR Doc. 90–4241 Filed 2–23–90; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 55, No. 38
Monday, February 26, 1990

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMISSION ON CIVIL RIGHTS

February 20, 1990.

DATE AND TIME: Friday, March 2, 1990, 1:30 p.m.–6:00 p.m.

PLACE: 1121 Vermont Avenue, NW., Room 512, Washington, DC 20425.

STATUS: Open to the Public.

MATTERS TO BE CONSIDERED:

I. Approval of Agenda
II. Approval of Minutes of October Meeting
Approval of Minutes of November Meeting
III. Announcements
IV. SAC Reports and Appointments
Southeast Asian Refugees and Their Access to Health and Mental Health Services (Connecticut)
Selected Civil Rights Issues in Iowa's Public Education
Civil Rights Implications of Minority Student Dropouts (Michigan)
Bigotry and Violence on Missouri's College Campuses
Equal Educational Opportunity for Minority Students in the Morris School District (New Jersey)
Implementing the 1988 Fair Housing Amendments Act (Pennsylvania)
Bigotry and Violence in Rhode Island, Alaska, Arizona, Hawaii, Indiana, Kansas, Louisiana, New Mexico, South Dakota, and Texas SAC Appointments
V. Commission Subcommittee Reports
VI. Staff Director's Report
A. FOIA Regulations
B. FY 1990 Budget
C. FY 1991 Budget
D. *Economic Status of Black Women: An Exploratory Investigation*
E. Statement on Bigotry and Violence
VII. Future Agenda Items

CONTACT PERSON FOR FURTHER INFORMATION: Barbara Brooks, Press and Communications Division, (202) 376–8312.

Jeffrey P. O'Connell,

Acting Solicitor.

[FR Doc. 90–4442 Filed 2–22–90; 1:54 pm]

BILLING CODE 6335-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

February 20, 1990.

TIME AND DATE: 10:00 a.m., Thursday, March 1, 1990.

PLACE: Room 600, 1730 K Street NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will hear oral argument on the following:

1. *Cyprus Empire Corporation v. Secretary of Labor,* Docket No. WEST 88–250–R, etc. (Issues include whether the administrative law judge erred in finding that Cyprus violated 30 CFR 75.202(a) and in affirming an imminent danger withdrawal order which was based in part on the alleged violation.)

Any person intending to attend this hearing who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 20 CFR 2706.150(a)(3) and 2706.160(d).

TIME AND DATE: Immediately following oral argument.

STATUS: Closed (Pursuant to 5 U.S.C. 552b(c)(10)).

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. Cyprus Empire Corporation, Docket No. WEST 88–250–R, etc.

It was determined by a unanimous vote of Commissioners that this item be considered in closed session.

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen, (202) 653–5629/(202) 708–9300 for TDD Relay 1–800–877–8339 (Toll Free).

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 90–4406 Filed 2–22–90; 1:52 pm]

BILLING CODE 6735-01-M

INTERSTATE COMMERCE COMMISSION

Commission Voting Conference

TIME AND DATE: 10:00 a.m., Thursday, March 1, 1990.

PLACE: Hearing Room A, Interstate Commerce Commission 12th and Constitution Avenue, NW., Washington, DC 20423.

STATUS: The purpose of the conference is for the Commission to discuss among themselves, and to vote on, the agenda item. Although the conference is open for the public observation, no public participation is permitted.

MATTERS TO BE DISCUSSED:

No. 38301S
Coal Trading Corporation, et al.
v.
The Baltimore and Ohio Railroad Company, et al.

CONTACT PERSON FOR MORE INFORMATION: A. Dennis Watson, Office of Government and Public Affairs, Telephone: (202) 275–7252.

Noreta R. McGee,

Secretary.

[FR Doc. 90–4407 Filed 2–22–90; 1:53 pm]

BILLING CODE 7035-01-M

NEIGHBORHOOD REINVESTMENT CORPORATION

Special Meeting of the Board of Directors

TIME AND DATE: 8:00 a.m., Tuesday, February 27, 1990.

PLACE: Comptroller of the Currency, 490 L'Enfant Plaza, SW., Sixth Floor, Comptroller's Conference Room, Washington, D.C. 20219.

STATUS: Closed.

CONTACT PERSON FOR MORE INFORMATION: Martha A. Diaz-Ortiz, Assistant Secretary, 376–2400.

AGENDA:

I. Annual Review of Executive Accomplishments, and other internal personnel matters; and
II. Officers' Compensation

Martha A. Diaz-Ortiz,

Assistant Secretary..

[FR Doc. 90–4446 Filed 2–22–90; 2:35 am]

BILLING CODE 7570-01-M

NEIGHBORHOOD REINVESTMENT CORPORATION

Audit Committee Meeting

TIME AND DATE: 10:00 a.m., Tuesday, February 27, 1990.

PLACE: Comptroller of the Currency, 490 L'Enfant Plaza SW., Sixth Floor, Comptroller's Conference Room, Washington, DC 20219.

STATUS: Closed.

CONTACT PERSON FOR MORE INFORMATION: Martha A. Diaz-Ortiz, Assistant Secretary, 376–2400.

AGENDA:

I. Receive report of outside auditors; and
II. Progress Report on followup to internal audit findings.

Martha A. Diaz-Ortiz,

Assistant Secretary.

[FR Doc. 90–4447 Filed 2–22–90; 8:45 am]

BILLING CODE 7570-03-M

Corrections

Federal Register
Vol. 55, No. 26
Monday, February 26, 1990

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 89-178]

Gypsy Moth Regulated Areas

Correction

In rule document 90-473 beginning on page 711 in the issue of Tuesday, January 9, 1990, make the following correction:

§ 301.45-2a [Corrected]

On page 712, in the second column, in amendatory instruction 2, in the first line, "Section 30.45-2a" should read "Section 301.45-2a".

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Part 799

[Docket No. 90129-9184]

RIN 0694-AA04

Electronic Computers and Related Equipment; Revisions Based on COCOM Review

Correction

In rule document 89-19259 beginning on page 33662 in the issue of Tuesday, August 15, 1989, make the following correction:

Supplement No. 1 to § 799.1 [Corrected]

On page 33663, in the first column, in ECCN 1565A, paragraphs "(h)(2)(vii)(a)-(m)" should be designated paragraphs "((h)(2)(vii)(A)-(M))" and paragraphs "(l)(a), (b) and (c)" should be designated paragraphs "(L)(*1*), (*2*) and (*3*)".

BILLING CODE 1505-01-D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

[Docket No. 90493-0038]

RIN 0648-AC15

Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic

Correction

In proposed rule document 90-3514 beginning on page 5242 in the issue of Wednesday, February 14, 1990, make the following correction:

On page 5242, in the second column, under **DATES**, in the last line, "March 1, 1990" should read "February 26, 1990".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions, and Delegations of Authority; Office of the Regional Director et al.

Correction

In notice document 90-3294 beginning on page 5072 in the issue of Tuesday, February 13, 1990, make the following correction:

On page 5072, in the third column, "2. Add a new paragraph D as follows:" "D. Division of Cost Allocation and Liaison."

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. 76C-0044 and 76N-0366]

RIN 0905-AB60

Color Additives; Denial of Petition for Listing of FD&C Red No. 3 for Use in Cosmetics and Externally Applied Drugs; Withdrawal of Petition for Use in Cosmetics Intended for Use in the Area of the Eye

Correction

In notice document 90-2264 beginning on page 3520 in the issue of Thursday, February 1, 1990, make the following corrections:

1. On page 3523, in the 2nd column, in the 23rd and 24th lines, remove,"or C.I. Food Red 14.45430".

2. On page 3524, in the 3rd column, in the 3rd complete paragraph, in the 22nd line, "(p<)" should read "(p>)".

3. On page 3529, in the third column, in paragraph (5), in the fifth line, "and" should read "are".

4. On the same page, in the same column, in the last paragraph, in the first line, "monodeiodinase" was misspelled.

5. On page 3530, in the 3rd column, in the 1st complete paragraph, in the 10th line, after "3" add "in".

6. On page 3531, in the second column, in the second complete paragraph, in the third line, "female" was misspelled.

7. On page 3533, in the second column, in paragraph (b), in the ninth line, "to" should read "and".

8. On page 3534, in the first column, in the seventh line, "tetraiodofluorescein", was misspelled.

9. On page 3536, in the 1st column, in paragraph (1), in the 13th line, "tests" was misspelled.

10. On the same page, in the second column, in paragraph (ii), in the 10th line, "euthyroid" was misspelled.

11. On page 3539, in the third column, in the third paragraph, in the first line, "TSH-medicated" should read "TSH-mediated".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 89-ANE-12; Amdt. 39-6419]

Airworthiness Directives: Garrett Engine Division (Hereinafter Called "Garrett"), Allied-Signal Inc., Models TFE731-3, -3A, -3AR, and -3R Turbofan Engines

Correction

In rule document 90-1228 beginning on page 2056 in the issue of Monday, January 22, 1990, make the following corrections:

1. On page 2057, in the table, in the first column, the eighth line should read "3074100-3/-6/-9".

2. On the same page, in the table, in the second column, remove all the dashes after "TFE".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 383

[FHWA Docket No. MC-88-14]

RIN 2125-AC19

Commercial Driver's License Standards; Disqualifications

Correction

In rule document 89-22883 beginning on page 40782 in the issue of Tuesday, October 3, 1989, make the following correction:

§ 383.51 [Corrected]

On page 40788, in the second column, in § 383.51(b)(3)(iv), in the third and fourth lines, "paragraphs (b)(3)(i) through (b)(2)(iv)" should read "paragraphs (b)(2)(i) through (b)(2)(iv)".

BILLING CODE 1505-01-D

federal register

Monday
February 26, 1990

Part II

Department of Transportation

Research and Special Programs Administration

49 CFR Parts 172 and 173

Air Bag Inflators and Modules for Passive Restraint Systems; Conversion of Individual Exemptions Into Regulations of General Applicability; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 172 and 173

[Docket No. HM-139H; Notice No. 90-3]

RIN 2137-AA44

Air Bag Inflators and Air Bag Modules for Passive Restraint Systems; Conversion of Individual Exemptions into Regulations of General Applicability

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: RSPA is proposing to amend the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) governing the transportation of air bag inflators and air bag modules, which are vehicular components in certain passive restraint systems. This proposal, based on a petition for rulemaking (P–1054) filed by the Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA), would provide for transportation of these components under provisions contained in the HMR rather than under the exemption program. The intended effect of this action is to simplify transportation of these components by eliminating the need for exemptions, thus reducing processing costs, paperwork and time delays.

DATES: Comments must be received by April 12, 1990.

ADDRESSES: Address comments to Dockets Unit, Office of Hazardous Materials Transportation, Washington, DC 20590. Comments should be submitted, when possible, in five copies and should identify the docket. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped postcard. The Dockets Unit is located in room 8421 of the Nassif Building, 400 Seventh Street SW., Washington, DC 20590. Office hours are 8:30 a.m. to 5 p.m., Monday through Friday, except public holidays.

FOR FURTHER INFORMATION CONTACT: Charles Schultz, (202) 366–4545, Technical Division; or Hattie L. Mitchell, (202) 366–4488, Standards Division, Office of Hazardous Materials Transportation, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Background

An air bag module is a complete assembly, consisting of an inflatable air bag and an inflator. This assembly is part of a passive restraint system mounted in the steering wheel or glove compartment of an automobile and is activated when the vehicle is subjected to a predetermined level of impact. The air bag inflator has three major components; namely, a main gas generant, a booster material and an igniter. The booster material and gas generant are typically class B propellant explosives. The igniter is typically a class C explosive.

Under the requirements in the HMR, an air bag inflator or an air bag module is described and classed as an explosive power device, class C or B, depending on its size. Except as specifically provided in § 173.86, the HMR require that all new explosives be examined and assigned a recommended shipping description and hazard class by the Department of the Interior's Bureau of Mines (BOM) or the Association of American Railroads' Bureau of Explosives (BOE), prior to their being classed and approved for transportation by the Director, Office of Hazardous Materials Transportation (OHMT). A "new explosive," as defined in § 173.86(a)(2), means an explosive compound, mixture or device, produced by a person who (1) has not previously produced that explosive compound, mixture or device; or (2) has previously produced the explosive compound, mixture or device but has made a change in the formulation, design, process or production equipment.

Under the terms of an exemption, air bag inflators and air bag modules may be classed as flammable solids for transportation in the United States when the complete package has been examined for that hazard class by the BOE or BOM and approved by the Director, OHMT. Exemption of these devices is based on extensive testing performed on air bag inflators and modules; i.e., bonfire test, initiation of the devices, etc. Since 1968, RSPA has issued five exemptions authorizing the transportation of air bag inflators and modules as flammable solids. These exemptions are DOT–E 8214, E 8236, E 8273, E 9066, and E 10086. All transportation of these devices as flammable solids in the United States are under exemption. RSPA issued another exemption, DOT–E 10103, which authorizes transportation of certain air bag modules, installed in automobile steering assemblies and packaged in accordance with the terms and conditions prescribed in the exemption, without being subject to the other requirements of the HMR. No incidents have been reported to RSPA involving transportation of these devices under the subject exemptions.

The MVMA has petitioned RSPA to amend the HMR to provide relief from the constraints of the DOT exemption process, and partial relief from the approval process for transportation of air bag inflators and modules. The MVMA petition requests that RSPA: (1) Add an entry of "Air bag module *or* air bag inflator assembly" in the Hazardous Materials Table, in § 172.101, with a corresponding hazard class of flammable solid; (2) Remove the requirement that sodium azide-based air bag modules and inflator assemblies must be examined by the BOE or BOM as a "new" explosive for each package modification, and; (3) Add requirements to allow air bag modules and inflators to be packaged in bulk quantities and be transported in all modes.

In its petition, MVMA stated, in part:

> During the initial development of the sodium azide-based inflator technology, review by the BOE or BOM of each modification and assignment by DOT of a separate exemption to each manufacturer may have been necessary to ensure this new technology did not present a hazard during transportation. However, 20 years of experience with the technology has demonstrated the manufacturers' ability to construct modules and inflators with exceptional reliability in handling and shipping.
>
> The sodium azide-based technology used today, is basically the same as that developed in the late 1960s and 1970s; however, enhancements have increased the safety and reliability of the inflators and modules. Improvements in the air bag systems have all but eliminated the potential of inadvertent deployment due to electromagnetic or radio frequency interference. When inflator housings began to be made of aluminum, an autoignition capability was added to improve safety in case of fire.
>
> Since the earliest development programs, many tests have been conducted and documented to improve and ensure the safety of the inflators and air bag modules, both installed in vehicles and as unassembled devices being handled and transported. The inflator/module is required to undergo strict design and construction validation tests as specified by the individual motor vehicle manufacturers and/or inflator manufacturers. These tests include various combinations of high and low temperature conditioning; high humidity soaks; vibration and shock (drop) treatment and high altitude simulations. These are nondestructive tests, designed to provide extreme conditioning without deployment or loss of structural integrity. Upon subsequent deployment, the conditioned hardware is expected to demonstrate performance to clearly defined

standards. Other tests conducted on the inflator and components to safeguard against inadvertent deployment include electrostatic and radio frequency interference tests. Bonfire testing is required on the inflators and/or modules to demonstrate that gas generation occurs prior to loss of structural integrity of the housing.

Since initial development in the late 1960s, nearly one-half million modules or inflator assemblies have been shipped under exemptions and approvals issued by your office. To our knowledge, there have been no inadvertent deployments during handling or shipping of either inflator assemblies or modules.

Because of the superior safety record and the extensive industry testing program, MVMA believes the regulation in transport of sodium azide-based air bag modules and inflator assemblies can be greatly simplified while providing an equivalent level of public safety.

One reason for MVMA's concern that these devices be transported under regulations of general applicability is the automotive industry's projection that as many as 3 million U.S.-manufactured cars may be equipped with air bags in 1990. This figure represents a substantial increase from the approximately 400,000 air bags installed in 1989 model cars. Beginning in the 1990 model year, all passenger cars sold in the United States are required under regulations issued by DOT's National Highway Traffic Safety Administration to be equipped with automatic restraints, consisting of either an air bag combined with a manual seat belt or an automatic motorized seat belt.

Based on the satisfactory transportation safety record that air bag inflators and modules have had over the past 20 years, RSPA agrees with the MVMA that consideration should be given to simplifying the process for shipment of these devices. However, RSPA finds that conversion of the exemptions into regulations of general applicability, as suggested by the MVMA, poses certain regulatory problems. First, RSPA does not agree with MVMA's suggestion that any inflator containing no more than 2 grams of ignition material, 140 grams of boostering materials or enhancers, and 850 grams of sodium azide-based propellant as the primary gas generant be classed as a flammable solid without examination by the BOM or BOE. These devices would currently be classed for transportation by RSPA as class C or B explosives, depending on the size of the individual device. Generally, devices containing over 200 grams of sodium azide gas generant are class B explosives. Under the terms and conditions of an exemption, RSPA authorizes the transortation of these devices as flammable solids based on an examination and review of the test results on the complete package, thus allowing shippers to transport the devices under less restricitve provisions. RSPA relies heavily on the BOM or BOE examination report to reclassify the complete package as a flammable solid.

Second, MVMA based its case for amending the requirements pertaining to air bag inflators and air bag modules on the fact that sodium azide-based gas generators have undergone many documented tests to ensure their safety and reliability when installed in vehicles, and as unassembled devices being handled and transported. While this line of reasoning may be true for the presently approved sodium azide-based devices, RSPA believes that other types of propellants and configurations will be considered for use in the future. MVMA's petition contains no proposal to ensure the continued use of safe designs and contains no safety measures or criteria for evaluation and testing of other types of gas generating materials. Accordingly, RSPA is proposing in this notice to retain the requirement that air bag inflators or air bag modules be examined by the BOE or BOM and be classed and approved for transportation by the Director, OHMT. However, the need for an exemption to reclassify these devices as flammable solids will no longer be necessary. Under this proposal, procedures for obtaining approval of these devices would be as follows:

1. Under the explosive approval provisions in § 173.86, a manufacturer would have the inflator or the module examined by the BOM or BOE and then submit a written application for approval of the device to the Director, OHMT. If a manufacturer obtains approval for an inflator and later attaches it to an air bag, the module becomes a new device requiring a new approval. However, unlike the inflator, which must be examined by the BOM or BOE, the module may be approved by the Director, OHMT, without additional examination if an applicant submits a complete, written application to the Director, OHMT. Any written application for the module should contain a detailed description of the device, including size, design, chemical composition (including a list of formulas), a master drawing showing location of all components, test results, the EX-number approval letter on the original inflator or module, if applicable, and copies of all other relevant background data for processing the approval request. To facilitate variations in the design, without the need for a new approval, the application data should be based on the maximum parameters of each particular design type for which approval is sought. The manufacturer will be issued one EX-number approval for the inflator and another EX-number approval for the module, as they are considered two different explosive devices. The approval will be based on the maximum parameters for which approval was sought. This will allow manufacturers to make certain changes in their device, for example, changes in the weights of the components or changes in hardware not affecting the safety of the units. If a manufacturer finds it questionable whether a change in formula or packaging is within the parameters of the approved design, details on the change may be submitted to RSPA for a determination on whether the modified device must be re-examined by the BOM or BOE. Any change in formula or packaging not within the parameters of the approved design is subject to the examination and approval provisions in § 173.86.

2. An applicant may seek approval for classification of an air bag inflator or an air bag module as a flammable solid in accordance with the provisions of § 173.199(b). In addition to the information outlined in item 1 above, the application should contain detailed information on the packaging intended for use in shipping the devices or, if unpackaged, on the handling system. Except when transported by aircraft, no quantity or weight restrictions would be imposed on the transportation of these devices as flammable solids.

RSPA believes these proposed provisions are needed to ensure package integrity, and to ensure the continued safe handling and transportation of these devices. RSPA believes all devices currently being manufactured would qualify for transportation in the United States as flammable solids or class C explosives. However, RSPA solicits comments on the accuracy of these assumptions and on whether there is a need to provide for the transportation of some of these devices as class B explosives. In addition, it should be noted that, irrespective of DOT approvals classifying these devices as flammable solids, these devices continue to be classed as explosives under the provisions of the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerious Goods by Air (ICAO Technical Instructions) and the International Maritime Organization's International Maritime Dangerous Goods Code (IMDG Code).

II. Review by Section

Section 172.101. The Hazardous Materials Table would be amended by adding two entries, "Air bag inflators or Air bag modules (for passive restraint systems)." One would appear with an identification number "NA 1325" and a corresponding hazard class of flammable solid, and the other with a corresponding hazard class of class C explosive.

Section 173.102. This section would be revised to provide for the transportation of air bag inflators and air bag modules as class C explosives.

Section 173.199. A new § 173.199 would authorize air bag inflators and modules to be classed as flammable solids after the complete package or handling system has been examined by the BOE or BOM and approved by the Director, OHMT. There would be no quantity or weight restrictions on the transportation of these devices, except when transported by aircraft.

III. Adminstrative Notices

A. Executive Order 12291

Based on information available concerning size and nature of entities likely to be affected, RSPA has determined that this rulemaking (1) is not "major" under Executive Order 12291; (2) is not "significant" under DOT Regulatory Policies and Procedures (44 FR 11034); (3) will not affect not-for-profit enterprises, or small governmental jurisdictions; and (4) does not require an environmental impact statement under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). A regulatory evaluation is available for review in the docket.

B. Executive Order 12612

I have reviewed this proposed rule in accordance with Executive Order 12612 ("Federalism") and have determined it has no substantial direct effects on the States, on the Federal-State relationship or on the distribution of power and responsibilities among levels of government. Thus, this proposed rule contains no policies that have Federalism implications, as defined in Executive Order 12612.

C. Impact on Small Entities

I certify that the proposed regulation will not have a significant economic impact on a substantial number of small entities under criteria of the Regulatory Flexibility Act.

D. Paperwork Reduction Act

Information collection requirements contained in current § 173.86 pertaining to new explosives have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)) and assigned control number, OMB No. 2137-0557. The information requirement contained in proposed § 173.199 is being submitted to OMB for review. Comments on the collection of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for the Department of Transportation. All comments must reference the title for this notice, "Air Bag Inflators and Air Bag Modules for Passive Restraint Systems."

IV. List of Subjects

49 CFR Part 172

Hazardous materials transportation.

49 CFR Part 173

Hazardous materials transportation and Packagings.

In consideration of the foregoing, 49 CFR parts 172 and 173 would be amended as follows:

PART 172—HAZARDOUS MATERIALS TABLES, HAZARDOUS MATERIALS COMMUNICATIONS REQUIREMENTS AND EMERGENCY RESPONSE INFORMATION REQUIREMENTS

1. The authority citation for part 172 would continue to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1806; 49 CFR part 1.

2. In § 172.101, the Hazardous Materials Table would be amended by adding entries, in alphabetical sequence, to read as follows:

§ 172.101 Hazardous Material Table.

* * * * *

+AW	Hazardous materials descriptions and proper shipping names	Hazard Class	Identification number	Label(s) required (if not excepted)	Packaging		Maximum net quantity in one package		Water Shipments		
					Exceptions	Specific requirements	Passenger carrying aircraft or railcar	Cargo only aircraft	Cargo vessel	Passenger vessel	Other requirements
(1)	(2)	(3)	(3A)	(4)	5(a)	5(b)	6(a)	6(b)	7(a)	7(b)	7(c)
	* * *										
	Air bag inflators *or* Air bag modules *(for passive restraint systems).*	Class C Explosive.		Explosive C	173.102	173.102	50 pounds	150 pounds	1,3	5	
	Air bag inflators *or* Air bag modules *(for passive restraint systems).*	Flammable Solid.	NA 1325	Flammable Solid.	173.199	173.199	50 pounds	150 pounds	1,2	1,2	
	* * *										

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

3. The authority citation for part 173 would continue to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1806, 1807, 1808; 49 CFR part 1.

4. In § 173.100, paragraph (jj) would be added to read as follows:

§ 173.100 Definition of Class C Explosives.

* * * * *

(jj) Air bag inflator (consisting of a casing containing a main gas generant, a booster material and an igniter) is a gas generator used to inflate an air bag in a passive restraint system in a motor vehicle. An air bag module is the inflator plus an inflatable bag.

5. Section 173.102 would be revised to read as follows:

§ 173.102 Explosive cable cutters, explosive power devices, explosive release devices, starter cartridges (jet engine), air bag inflators or air bag modules (for passive restraint systems); Class C explosives.

(a) *Packagings:* Class C explosives covered by this section must be securely packaged as follows:

(1) In specification 12H, 23F, or 23H (§§ 178.209, 178.214 or § 178.219 of this chapter) fiberboard boxes. The gross weight of each package may not exceed 65 pounds.

(2) In strong wooden or metal boxes.

(b) Electrical contacts for ignition and lead wires, when present, must be short-circuited.

(c) *Marking:* In addition to meeting the marking requirements in Subpart D of Part 172 of this chapter, each package must be plainly marked "HANDLE CAREFULLY—KEEP FIRE AWAY."

(d) *Exceptions:* Under the provisions of § 173.86(i), the Director, OHMT may revise the classification for a device or except the device from the requirements of this subchapter. See § 173.199 for an air inflator or air bag module which has been classed as a flammable solid.

6. A new § 173.199 would be added to read as follows:

§ 173.199 Air bag inflators or air bag modules (for passive restraint systems).

(a) *Definitions:* An air bag inflator (consisting of a casing containing a main gas generant, a booster material and an igniter) is a gas generator used to inflate an air bag in a passive restraint system in a motor vehicle. An air bag module is the inflator plus an inflatable bag.

(b) *Classification and packaging:* Under the provisions of § 173.86(i), an air bag inflator or air bag module may be classed as a flammable solid when the complete package or, if unpackaged, the handling system has been examined by the Bureau of Explosives or the Bureau of Mines and approved by the Director, OHMT. The package or handling system used must conform with the terms and conditions prescribed in the approval. (NOTE: Notwithstanding classification of air bag inflators or air bag modules as flammable solids by the Director, OHMT, these devices are classed as explosives under the provisions of the ICAO Technical Instructions and the IMDG Code).

(c) *Exceptions:* (1) The Director, OHMT, may except certain air bag inflators or air bag modules from the requirements of this subchapter in the same manner as provided for explosives under § 173.86(i).

(2) An air bag module that has been approved by the Director, OHMT, and is installed in a motor vehicle is not subject to the requirements of this subchapter.

Issued in Washington, DC, on February 20, 1990, under authority delegated in 49 CFR part 106, Appendix A.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

[FR Doc. 90–4201 Filed 2–23–90; 8:45 am]

BILLING CODE 4910–60–M

federal register

Monday
February 26, 1990

Part III

New Restrictions on Lobbying; Interim Final Rule

Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Labor
Department of State
Department of Transportation
Department of the Treasury
Department of Veterans Affairs
ACTION
International Development Cooperation Agency
Agency for International Development
Environmental Protection Agency
Export-Import Bank of the United States
Federal Emergency Management Agency
General Services Administration
National Aeronautics and Space Administration
National Foundation on the Arts and the Humanities
National Endowment for the Arts
National Endowment for the Humanities
National Science Foundation
Overseas Private Investment Corporation
Peace Corps
Small Business Administration
Tennessee Valley Authority
United States Information Agency

DEPARTMENT OF AGRICULTURE

7 CFR PART 3018

DEPARTMENT OF ENERGY

10 CFR PARTS 600 AND 601

EXPORT-IMPORT BANK OF THE UNITED STATES

12 CFR PART 411

SMALL BUSINESS ADMINISTRATION

13 CFR PART 146

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR PART 1271

DEPARTMENT OF COMMERCE

15 CFR PART 28

TENNESSEE VALLEY AUTHORITY

18 CFR PART 1315

DEPARTMENT OF STATE

22 CFR PART 138

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR PART 227

PEACE CORPS

22 CFR PART 311

UNITED STATES INFORMATION AGENCY

22 CFR PART 519

OVERSEAS PRIVATE INVESTMENT CORPORATION

22 CFR PART 712

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR PART 87

DEPARTMENT OF JUSTICE

28 CFR PART 69

DEPARTMENT OF LABOR

29 CFR PART 93

DEPARTMENT OF THE TREASURY

31 CFR PART 21

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR PART 282

DEPARTMENT OF EDUCATION

34 CFR PART 82

DEPARTMENT OF VETERANS AFFAIRS

38 CFR PART 45

ENVIRONMENTAL PROTECTION AGENCY

40 CFR PART 34

GENERAL SERVICES ADMINISTRATION

41 CFR PART 105-69

DEPARTMENT OF THE INTERIOR

43 CFR PART 18

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR PART 18

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR PART 93

NATIONAL SCIENCE FOUNDATION

45 CFR PART 604

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

45 CFR PART 1158

National Endowment for the Humanities

45 CFR PART 1168

ACTION

45 CFR PART 1230

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR PART 20

New Restrictions on Lobbying

AGENCIES: Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Humnan Services, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, Veterans Affairs; ACTION, Agency for International Development, Environmental Protection Agency, Export-Import Bank of the United States, Federal Emergency Management Agency, General Services Administration, National Aeronautics and Space Administration, National Endowment for the Arts, National Endowment for the Humanities, National Science Foundation, Overseas Private Investment Corporation, Peace Corps, Small Business Administration, Tennessee Valley Authority and United States Information Agency.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule is in response to section 319 of Public Law 101-121. Section 319 generally prohibits recipients of Fedreal contracts, grants, and loans from using appropriated funds for lobbying the Executive or Legislative Branches of the Federal Government in connection with a specific contract, grant, or loan. Section 319 also requires that each person who requests or receives a Federal contract grant, cooperative agreement, loan, or a Federal commitment to insure or guarantee a loan, must disclose lobbying.

DATES: OMB's interim final governmentwide guidance was effective December 23, 1989; this rule is effective February 26, 1990, except for the Department of Education. For the Department of Education effective date, see the agency specific preamble below. Comments must be in writing and must be received by April 27, 1990. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to the Office of Management and Budget, 10300 New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: See agency-specific preambles for the contact person for each agency.

SUPPLEMENTARY INFORMATION:

A. Background

On October 23, 1989, the president signed into law the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 ("the Act"). Section 319 of the Act amended title 31, United States Code, by adding a new section 1352, entitled "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions." Section 1352 took effect with respect to Federal contracts, grants, loans, cooperative agreements, loan insurance commitments, and loan guarantee commitments that were or are entered into more then 60 days after the date of the enactment of the Act, i.e., December 23, 1989.

Section 1352 required the Director of the Office of Management and Budget (OMB) to issue governmentwide guidance for agency implementation of, and compliance with, the requirements of this section. The Conference Report

indicated that the conferees "expect that all agencies shall expeditiously promulgate regulations to implement the requirements of this section, and that all such regulations shall be uniform and shall comply with the government-wide guidance issued by the Office of Management and Budget pursuant to paragraph (b)(7). Also, major agencies, as designated by OMB, shall issue a common rule complying with the guidance issued by OMB."

On December 18, 1989, OMB issued interim final governmentwide guidance. This guidance was published on December 20, 1989 (54 FR 52306–52332). In OMB's guidance, the following 29 major agencies were identified: Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, State, Transporation, Treasury, Veterans Affairs; ACTION, Agencies for International Development, Environmental Protection Agency, Export-Import Bank of the United States, Federal Emergency Management Agency, General Services Administration, National Aeronautics and Space Administration, National Endowment for the Arts, National Endowment for the Humanities, National Science Foundation, Overseas Private Investment Corporation, Peace Corps, Small Business Administration, Tennessee Valley Authority and United States Information Agency.

A second interim final common rule, part of the Federal Acquisition Regulation (FAR), for most contracts was published on January 30, 1990 (55 FR 3190). The FAR rule, this common rule, and OMB's interim final guidance will share a public docket. The final versions of all three will be published simultaneously.

Submission of Appendix A, Certification for Contracts, Grants, Loans, and Cooperative Agreements or Statement for Loan Guarantees and Loan Insurance, does not bind the Federal Goverment to award a contract, grant, loan, or cooperative agreement, or to make a commitment for a loan guarantee or loan insurance.

B. Regulatory Process Matters

This rule is not a major rule under Executive Order 12291. The Act requires certifications and disclosures to be made by all types of entities, including State agencies. For this reason, the agencies have determined that the rule will not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment under Executive Order 12612.

As a statutory matter, this rule applies to all entities, regardless of size.

The agencies find that publishing a notice of proposed rulemaking on this matter would be impracticable, unnecessary, and contrary to the public interest, since it would prevent compliance with the statutory deadline (60 days from the statute's date of enactment) for issuance of OMB's governmentwide guidance and the governmentwide effective date.

Consequently, this rule is published as an interim final rule. As an interim final rule, this regulation is fully in effect and binding. No further regulatory action by the agencies is essential to the legal effectiveness of the rule. In order to benefit from comments that interested parties and the public may make however, the agencies will keep the rulemaking docket open for 60 days. Comments are invited, on all portions of the rulemaking, through April 27, 1990. Following the close of the comment period, OMB and the agencies will respond to the comments and, if appropriate, amend provisions of OMB's governmentwide guidance and this rule.

C. Paperwork Reduction Act

This rule contains information collection requirements subject to the Paperwork Reduction Act. A Paperwork Reduction Act emergency approval was requested by OMB pursuant to 44 U.S.C. 3507(g) and 5 CFR 1320.18 and was granted under OMB control number 0348–0046. OMB estimates the reporting burden for this information collection to average 30 minutes per response. The time necessary for filing the first disclosure may differ from that for the subsequent disclosures. However, in the absence of experience with such reporting, OMB does not have sufficient data to determine the universe of total covered Federal actions or the volume of activity that will be affected by this rule. Therefore, an estimate of the total burden of this information collection requirement is not provided at this time. Public comment is requested to assist in accurately estimating the burden of this information collection, including: (1) Estimates of the amount of time required to comply with this reporting requirement, (2) estimates of the number of expected disclosure reports, and (3) the basis for these estimates.

Text of the Common Rule

The text of the common rule, as adopted by the agencies in this document, appears below.

PART _____—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

_____.100 Conditions on use of funds.
_____.105 Definitions.
_____.110 Certification and disclosure.

Subpart B–Activities by Own Employees

_____.200 Agency and legislative liaison.
_____.205 Professional and technical services.
_____.210 Reporting.

Subpart C—Activities by Other than Own Employees

_____.300 Professional and technical services.

Subpart D—Penalties and Enforcement

_____.400 Penalties.
_____.405 Penalty procedures.
_____.410 Enforcement.

Subpart E—Exemptions

_____.500 Secretary of Defense.

Subpart F—Agency Reports

_____.600 Semi-annual compilation.
_____.605 Inspector General report.

Appendix A to Part _____—Certification Regarding Lobbying

Appendix B to Part _____—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); [citation to Agency rulemaking authority].

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§_____.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ _____.105 Definitions.

For purposes of this part:

(a) *Agency,* as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or

interstate entity having governmental duties and powers.

§ _____.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000, unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either Subpart B or C.

Subpart B—Activities by Own Employees

§ _____.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § _____.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ _____.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § _____.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of

a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ _____.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ _____.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § _____.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § _____.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ _____.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ _____.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these

provisions are not inconsistent with the requirements herein.

§ _____.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ _____.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ _____.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ _____. 605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

Appendix A to Part _____— Certification Regarding Lobbying

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form–LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form–LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil

penalty of not less than $10,000 and not more than $100,000 for each such failure.

Appendix B to Part _____—Disclosure Form to Report Lobbying

BILLING CODES 3410-01-M; 6450-01-M; 6690-01-M; 8025-01-M; 7510-01-M; 3510-FE-M; 8120-01-M; 4710-24-M; 6116-01-M; 6051-01-M; 8230-01-M; 3210-01-M; 4210-32-M; 4410-18-M; 4510-23-M; 4810-25-M; 3801-01-M; 4000-01-M; 3820-01-M; 6560-50-M; 6820-61-M; 4310-RF-M; 6718-01-M; 4150-04-M; 7555-01-M; 7537-01-M; 7536-01-M; 6050-28-M; 4910-62-M

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:	2. Status of Federal Action:	3. Report Type:
☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	☐ a. bid/offer/application b. initial award c. post-award	☐ a. initial filing b. material change **For Material Change Only:** year _____ quarter _____ date of last report _____

4. Name and Address of Reporting Entity:	5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:
☐ Prime ☐ Subawardee Tier _____, *if known*: **Congressional District,** *if known*:	 **Congressional District,** *if known*:
6. Federal Department/Agency:	**7. Federal Program Name/Description:** CFDA Number, *if applicable*: _____
8. Federal Action Number, *if known*:	**9. Award Amount,** *if known*: $
10. a. Name and Address of Lobbying Entity *(if individual, last name, first name, MI)*:	**b. Individuals Performing Services** *(including address if different from No. 10a)* *(last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply)*:	13. Type of Payment *(check all that apply)*:
$ _____ ☐ actual ☐ planned	☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____
12. Form of Payment *(check all that apply)*: ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____	

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16.	
Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** _____ **Print Name:** _____ **Title:** _____ **Telephone No.:** _____ **Date:** _____

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INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.

12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.

13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.

14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.

15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.

16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ Page _____ of _____

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BILLING CODES 3410-01-C; 6450-01-C; 6690-01-C; 8025-01-C; 7510-01-C; 3510-FE-C; 8120-01-C; 4710-24-C; 6116-01-C; 6051-01-C; 8230-01-C; 3210-01-C; 4210-32-C; 4410-18-C; 4510-23-C; 4810-25-C; 3801-01-C; 4000-01-C; 3820-01-C; 6560-50-C; 6820-61-C; 4310-RF-C; 6718-01-C; 4150-04-C; 7555-01-C; 7537-01-C; 7536-01-C; 6050-28-C; 4910-62-C

Adoption of the Common Rule

The agency specific preambles adopting the text of the common rule appear below.

DEPARTMENT OF AGRICULTURE

7 CFR Part 3018

FOR FURTHER INFORMATION CONTACT: Joseph J. Daragan, 202–447–5729 or Tresa Matthews, 202–382–8978.

ADDITIONAL SUPPLEMENTARY INFORMATION: Title IV, section 401 of the Housing and Urban Development Reform Act of 1989, Pub. L. 101–235, enacted December 15, 1989, amended the Housing Act of 1949, 42 U.S.C. 1471, to add a new section 536 regarding Accountability in Awards of Assistance; Remedies and Penalties under the Rural Housing Program. Among other things, section 536 requires any person engaged for monetary consideration or for any consideration for the purpose of attempting to influence any award or allocation of assistance to register with the Secretary of Agriculture and to disclose such purposes and consideration received for the duration of the activity.

When implemented as a final rule, the requirements of section 401 will be set forth in 7 CFR part 1944. It is the intention of the Department to reconcile, at that time, the sometimes parallel requirements of today's rule and the upcoming revisions to 7 CFR part 1944.

List of Subjects in 7 CFR Part 3018

Contract programs, Grant programs, Loan programs, Lobbying.

Title 7 of the Code of Federal Regulations is amended as set forth below.

Jack C. Parnell,

Deputy Secretary of Agriculture.

Part 3018 is added to read as set forth at the end of the common preamble.

PART 3018—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Appendix A to Part 3018—Certification Regarding Lobbying

Appendix B to Part 3018—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 5 U.S.C. 301.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF ENERGY

10 CFR Parts 600 and 601

FOR FURTHER INFORMATION CONTACT: Howard K. Mitchell, (202) 586–8190.

ADDITIONAL SUPPLEMENTARY INFORMATION: Because the New Restrictions on Lobbying, contained in section 319 of Public Law 101–121, also apply to other nonprocurement transactions not covered in 10 CFR part 600 (grants and cooperative agreements), the Department of Energy (DOE) is implementing the common rule in a new part, 10 CFR part 601. Since nearly all of DOE nonprocurement applicants and awardees are subject to 10 CFR part 600, a new § 600.34 is also being included to reference the requirements of this common rule.

List of Subjects

10 CFR Part 600

Financial assistance rules.

10 CFR Part 601

Contract programs, Grant programs, Loan programs, Lobbying.

Title 10 of the Code of Federal Regulations is amended as set forth below.

Berton J. Roth,

Director, Directorate of Procurement and Assistance Management.

PART 600—FINANCIAL ASSISTANCE RULES

1. The authority citation of part 600 continues to read as follows:

Authority: Secs. 644 and 646, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Pub. L. 97–258, 96 Stat. 1003–1005 (31 U.S.C. 6301–6308).

2. A new § 600.34 is added as set forth below.

§ 600.34 New restrictions on lobbying.

Each DOE solicitation involving a new Federal commitment in excess of $100,000 shall provide a full text copy of the certification requirement set forth in appendix A of 10 CFR part 601 and Disclosure of Lobbying Activities Standard Form—LLL. DOE Contracting Officers shall assure that any award in excess of the $100,000 threshold shall contain, as a term and condition of award, the requirement to comply with the certification and disclosure provision of 10 CFR 601.110. Upon receipt, the original copy of each disclosure form shall be kept with the official award file. One copy of each form shall be forwarded to the Director or designee.

3. Part 601 is added to read as set forth at the end of the common preamble.

PART 601—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Appendix A to Part 601—Certification Regarding Lobbying

Appendix B to Part 601—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); Secs. 644 and 646, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254 and 7256); Pub. L. 96–258, 96 Stat. 1003–1005 (31 U.S.C. 6301–6308).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

EXPORT-IMPORT BANK OF THE UNITED STATES

12 CFR Part 411

FOR FURTHER INFORMATION CONTACT: Robert J. McKinsey 566–8823.

List of Subjects in 12 CFR Part 411

Contract programs, Grant programs, Loan programs, Lobbying.

Title 12-Chapter IV of the Code of Federal Regulations is amended as set forth below.

Hart Fessenden,

General Counsel.

Part 411 is added to read as set forth at the end of the common preamble.

PART 411—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

411.100 Conditions on use of funds.
411.105 Definitions.
411.110 Certification and disclosure.

Subpart B—Activities by Own Employees

411.200 Agency and legislative liaison.
411.205 Professional and technical services.
411.210 Reporting.

Subpart C—Activities by Other Than Own Employess

411.300 Professional and technical services.

Subpart D—Penalties and Enforcement

411.400 Penalties.
411.405 Penalty procedures.
411.410 Enforcement.

Subpart E—Exemptions

411.500 Secretary of Defense.

Subpart F—Agency Reports

411.600 Semi-annual compilation.
411.605 Inspector General report.

Appendix A to Part 411—Certification Regarding Lobbying

Appendix B to Part 411—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 5 U.S.C. 552a.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 146

FOR FURTHER INFORMATION CONTACT: Patricia R. Forbes, Chief Counsel for Legislation, U.S. Small Business Administration, (202) 653–6573.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Small Business Administration (SBA) has determined that its Surety Bond Guarantee, Lease Guarantee and certain aspects of its Small Business Investment Company programs are not subject to the provisions of section 319 as implemented by this interim final rule.

Section 319 prohibits the recipients of a "Federal contract" from using appropriated funds to pay for influencing activities. This interim final rule defines Federal contract as "an *acquisition* contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR." (emphasis added) The Surety Bond Guarantee (SBG) contract between SBA and a Surety guarantees the Surety against a stated percentage of any loss, if the surety issues a bond for the benefit of a small concern bidding for or performing a contract with a governmental or non-governmental customer (15 U.S.C. 694b). Accordingly, SBA is not acquiring either property or services. Similarly, under its Lease Guarantee program, SBA is assuring a landlord that a small concern will fulfill the payment conditions of its lease (15 U.S.C. 692). SBA is not acquiring either property or services. Therefore, neither SBA's SBG program or Lease Guarantee program are subject to the requirements of this rule.

For the following reasons SBA has determined that section 319 applies to SBA's guarantee of regular (Section 301(c)) and specialized (Section 301(d)) Small Business Investment Company (SBIC) debentures, but does not apply to SBA's acquisition of preferred stock from specialized SBIC's.

Under section 303 of the Small Business Investment Act, 15 U.S.C. 683, SBA is authorized to purchase or to guarantee the debentures of SBIC's licensed under the Act. SBA guarantees the sale of an SBIC's debentures to investors by means of the issuance of guaranteed participation certificates backed by a pool of guaranteed debentures. The guaranteed debentures of specialized SBIC's may be included in such pools. These transactions fall within section 319, as loan guarantees, and are therefore subject to these new restrictions on influencing activities.

Section 303(c)(1) of the Small Business Investment Act (15 U.S.C. 683(c)(1)) authorizes SBA to purchase shares of non-voting preferred stock from specialized SBIC's. These purchases are neither loans nor loan guarantees, nor acquisition contracts for real or personal property or services.

Finally, SBA has determined that Service Corps of Retired Executives (SCORE) and Active Corps Executives (ACE) are not "officer(s) or employee(s) of an agency" to which the prohibition on influencing by use of appropriated funds applies. This interim final rule defines "officers and employees of an agency" to include Federal employees appointed under Title 5 of the U.S. Code, members of the uniformed services, special Government employees as defined in 18 U.S.C. 202 and Federal advisory committee members under Title 5 U.S. Code appendix 2. SCORE and ACE volunteers do not fall within any of these categories, including "special government employees." 18 U.S.C. 202 only applies to specific sections within Title 18 of the Code concerning bribery, graft and conflicts of interest, and only concerns employees appointed for a period not to exceed 130 days in any consecutive 365 day period. In addition, section 8(b)(1)(C)(i) of the Small Business Act (15 U.S.C. 637(b)(1)(C)(i)) states that SCORE and ACE volunteers are deemed to be Federal employees only for purposes of worker's compensation and the Federal Tort Claims Act.

List of Subjects in 13 CFR Part 146

Contract programs, Grant programs, Loan programs, Lobbying.

Title 13 of the Code of Federal Regulations is amended as set forth below.

Susan S. Engeleiter,

Administrator.

Part 146 is added to read as set forth at the end of the common preamble.

PART 146—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

146.100 Conditions on use of funds.
146.105 Definitions.
146.110 Certification and disclosure.

Subpart B—Activities by Own Employees

146.200 Agency and legislative liaison.
146.205 Professional and technical services.
146.210 Reporting.

Subpart C—Activities by Other Than Own Employees

146.300 Professional and technical services.

Subpart D—Penalties and Enforcement

146.400 Penalties.
146.405 Penalty procedures.
146.410 Enforcement.

Subpart E—Exemptions

146.500 Secretary of Defense.

Subpart F—Agency Reports

146.600 Semi-annual compilation.
146.605 Inspector General report.

Appendix A to Part 146—Certification Regarding Lobbying

Appendix B to Part 146—Disclosure Form to Reporting Lobbying

Authority: Section 319, Pub. L. 101–121 (31 U.S.C. 1352); 15 U.S.C. 634(b)(6).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1271

FOR FURTHER INFORMATION CONTACT: W.A. Greene, Chief, Regulations Development Branch, Procurement Policy Division (Code HP), Office of Procurement, NASA Headquarters, Washington, DC 20546, Telephone: (202) 453–8923.

ADDITIONAL SUPPLEMENTARY INFORMATION: Internal NASA implementation procedures, required by § 1271.410, shall be established in accordance with NASA grant regulations at 14 CFR part 1260 (the NASA Grant and Cooperative Agreement Regulation).

Lists of Subjects in 14 CFR Part 1271

Contract programs, Cooperative agreements, Grant programs, Grants, Loan programs, Lobbying.

Title 14 of the Code of Federal Regulations is amended as set forth below.

S.J. Evans,

Assistant Administrator for Procurement.

Part 1271 is added to read as set forth at the end of the common preamble.

PART 1271—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
1271.100 Conditions on use of funds.
1271.105 Definitions.
1271.110 Certification and disclosure.

Subpart B—Activities by Own Employees

1271.200 Agency and legislative liaison.
1271.205 Professional and technical services.
1271.210 Reporting.

Subpart C—Activities by Other Than Own Employees

1271.300 Professional and technical services.

Subpart D—Penalties and Enforcement

1271.400 Penalties.
1271.405 Penalty procedures.
1271.410 Enforcement.

Subpart E—Exemptions

1271.500 Secretary of Defense.

Subpart F—Agency Reports

1271.600 Semi-annual compilation.
1271.605 Inspector General report.

Appendix A to Part 1271—Certification Regarding Lobbying

Appendix B to Part 1271—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); Public Law 97–258 (31 U.S.C. 6301 et seq.)

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF COMMERCE

15 CFR Part 28

FOR FURTHER INFORMATION CONTACT: Barbara L. Spithas, Telephone: (202) 377–5817.

List of Subjects in 15 CFR Part 28

Contract programs, Grant programs, Loan programs, Lobbying.

Title 15 of the Code of Federal Regulations is amended as set forth below.

Sonya G. Stewart,

Director for Finance and Federal Assistance.

Part 28 is added to read as set forth at the end of the common preamble.

PART 28—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
28.100 Conditions on use of funds.
28.105 Definitions.
28.110 Certification and disclosure.

Subpart B—Activities by Own Employees

28.200 Agency and legislative liaison.
28.205 Professional and technical services.
28.210 Reporting.

Subpart C—Activities by Other Than Own Employees

28.300 Professional and technical services.

Subpart D—Penalties and Enforcement

28.400 Penalties.
28.405 Penalty procedures.
28.410 Enforcement.

Subpart E—Exemptions

28.500 Secretary of Defense.

Subpart F—Agency Reports

28.600 Semi-annual compilation.
28.605 Inspector General report.

Appendix A to Part 28—Certification Regarding Lobbying

Appendix B to Part 28—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 5 U.S.C. 301.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

TENNESSEE VALLEY AUTHORITY

18 CFR Part 1315

FOR FURTHER INFORMATION CONTACT: Charles L. Young, 615 632–7305.

List of Subjects in 18 CFR Part 1315

Contract programs, Grant programs, Loan programs, Lobbying.

Title 18 of the Code of Federal Regulations is amended as set forth below.

W.F. Willis,

Executive Vice President and Chief Operating Officer.

Part 1315 is added to read as set forth at the end of the common preamble.

PART 1315—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
1315.100 Conditions on use of funds.
1315.105 Definitions.
1315.110 Certification and disclosure.

Subpart B—Activities by Own Employees

1315.200 Agency and legislative liaison.
1315.205 Professional and technical services.
1315.210 Reporting.

Subpart C—Activities by Other Than Own Employees

1315.300 Professional and technical services.

Subpart D—Penalties and Enforcement

1315.400 Penalties.
1315.405 Penalty procedures.
1315.410 Enforcement.

Subpart E—Exemptions

1315.500 Secretary of Defense.

Subpart F—Agency Reports

1315.600 Semi-annual compilation.
1315.605 Inspector General report.

Appendix A to Part 1315—Certification Regarding Lobbying

Appendix B to Part 1315—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 16 U.S.C. 831–831dd.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF STATE

22 CFR Part 138

FOR FURTHER INFORMATION CONTACT: James Tyckoski, Office of the Procurement Executive (703) 875–7046.

List of Subjects in 22 CFR Part 138

Contract programs, Grant programs, Loan programs, Lobbying.

Title 22 of the Code of Federal Regulations is amended as set forth below.

John J. Conway,

Procurement Executive.

Part 138 is added to read as set forth at the end of the common preamble.

PART 138—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 22 U.S.C. 2658.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

22 CFR Part 227

FOR FURTHER INFORMATION CONTACT: Kathleen O'Hara, (703) 875–1534.

List of Subjects in 22 CFR Part 227

Contract programs, Grant programs, Loan programs, Lobbying.

Title 22 of the Code of Federal Regulations is amended as set forth below.

John F. Owens,

Deputy Assistant to the Administrator for Management.

Part 227 is added to read as set forth at the end of the common preamble.

PART 227—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); Sec. 621, Foreign Assistance Act of 1961, as amended, 75 Stat. 445 (22 U.S.C. 2381).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

PEACE CORPS

22 CFR Part 311

FOR FURTHER INFORMATION CONTACT: Kirby Mullen, (202) 254–3114.

ADDITIONAL SUPPLEMENTARY INFORMATION: Peace Corps has determined that Peace Corps Volunteers are not "Officer(s) or employee(s) of an agency" to which the prohibition on influencing by use of appropriated funds applies. This interim final rule defines "officers and employees of an agency" to include Federal employees appointed under Title 5 of the U.S. Code, members of the uniformed services, special Government employees as defined in 18 U.S.C. 202 and Federal advisory committee members under Title 5 U.S. Code Appendix 2. Peace Corps Volunteers do not fall within any of these categories, including "special government employees." 18 U.S.C. 202 only applies to specific sections within Title 18 of the Code concerning bribery, graft and conflicts of interest, and only concerns employees appointed for a period not to exceed 130 days in any consecutive 365 day period. In addition, Peace Corps Volunteers are only deemed to be Federal employees for purposes of worker's compensation, 5 U.S.C. 8142, the Federal Tort Claims Act and other purposes as detailed in 22 U.S.C. 2504.

List of Subjects in 22 CFR Part 311

Contract programs, Cooperative agreements, Grant programs, Loan programs, Lobbying.

Title 22 of the Code of Federal Regulations is amended as set forth below.

Paul D. Coverdell,

Director.

Part 311 is added to read as set forth at the end of the common preamble.

PART 311—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 22 U.S.C. 2503.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

UNITED STATES INFORMATION AGENCY

22 CFR Part 519

FOR FURTHER INFORMATION CONTACT: Darwin Roberts, United States Information Agency, Office of Contracts, Policy and Procedures Staff, Room 1611, 330 C Street, SW., Washington, DC 20547, Telephone: (202) 485–6401

List of Subjects in 22 CFR Part 519

Contract programs, Grant programs, Loan programs, Lobbying.

Title 22 of the Code of Federal Regulations is amended as set forth below.

Henry E. Hockeimer,

Associate Director for Management.

Part 519 is added to read as set forth at the end of the common preamble.

PART 519—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

519.100 Conditions on use of funds.
519.105 Definitions.
519.110 Certification and disclosure.

Subpart B—Activities by Own Employees

519.200 Agency and legislative liaison.
519.205 Professional and technical services.
519.210 Reporting.

Subpart C—Activities by Other Than Own Employees

519.300 Professional and technical services.

Subpart D—Penalties and Enforcement

519.400 Penalties.
519.405 Penalty procedures.
519.410 Enforcement.

Subpart E—Exemptions

519.500 Secretary of Defense.

Subpart F—Agency Reports

519.600 Semi-annual compilation.
519.605 Inspector General report.

Appendix A to Part 519—Certification Regarding Lobbying

Appendix B to Part 519—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 41 U.S.C. 701 et seq.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

OVERSEAS PRIVATE INVESTMENT CORPORATION

22 CFR Part 712

FOR FURTHER INFORMATION CONTACT: James R. Offutt, Senior Counsel for Legislative and Administrative Affairs, 202–457–7038.

List of Subjects in 22 CFR Part 712

Contract programs, Grant programs, Guarantees, Insurance, Loan guarantees, Loan insurance, Loans, Lobbying.

Title 22 of the Code of Federal Regulations is amended as set forth below.

James R. Offutt,

Senior Counsel for Legislative and Administrative Affairs.

Part 712 is added to read as set forth at the end of the common preamble.

PART 712—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

712.100 Conditions on use of funds.
712.105 Definitions.
712.110 Certification and disclosure.

Subpart B—Activities by Own Employees

712.200 Agency and legislative liaison.
712.205 Professional and technical services.
712.210 Reporting.

Subpart C—Activities by Other Than Own Employees

712.300 Professional and technical services.

Subpart D—Penalties and Enforcement

712.400 Penalties.
712.405 Penalty procedures.
712.410 Enforcement.

Subpart E—Exemptions

712.500 Secretary of Defense.

Subpart F—Agency Reports

712.600 Semi-annual compilation.
712.605 Inspector General report.

Appendix A to Part 712—Certification Regarding Lobbying

Appendix B to Part 712—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 87

FOR FURTHER INFORMATION CONTACT: Roosevelt Jones, Acting Director, Office of Ethics, Room 10110, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 755–4250 (this is not a toll-free number).

ADDITIONAL SUPPLEMENTARY INFORMATION: Section 112 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101–235, approved December 15, 1989, amended the Department of Housing and Urban Development Act, 42 U.S.C. 3531, to add a new section 13 regarding the registration of consultants. Among other things, section 112 requires any person making an expenditure to influence a departmental decision with respect to the award of any financial assistance or management action that changes the terms and conditions or status of the financial assistance to keep records on all such expenditures. This requirement does not apply to expenditures incurred in complying with conditions, requirements, or procedures imposed by the Secretary of HUD with respect to the financial assistance. Section 112 also requires each person receiving payment or any consideration to influence a departmental decision to register with the Secretary of HUD.

When implemented as a final rule, the requirements of section 112 will be set forth in part 86. It is the intention of the Department to reconcile, at that time, the sometimes parallel requirements of today's rule and the upcoming part 86 HUD rule.

List of Subjects in 24 CFR Part 87

Contract programs, Grant programs, Loan programs, Lobbying.

Title 24 of the Code of Federal Regulations is amended as set forth below.

Jack Kemp,

Secretary.

Part 87 is added to read as set forth at the end of the common preamble.

PART 87—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

87.100 Conditions on use of funds.
87.105 Definitions.
87.110 Certification and disclosure.

Subpart B—Activities by Own Employees

87.200 Agency and legislative liaison.
87.205 Professional and technical services.
87.210 Reporting.

Subpart C—Activities by Other Than Own Employees

87.300 Professional and technical services.

Subpart D—Penalties and Enforcement

87.400 Penalties.
87.405 Penalty procedures.
87.410 Enforcement.

Subpart E—Exemptions

87.500 Secretary of Defense.

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Cross reference: See also OMB notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF JUSTICE

28 CFR Part 69

[Atty. Gen. Order No. 1397–90]

FOR FURTHER INFORMATION CONTACT: Cynthia J. Schwimer (202) 724–3186.

List of Subjects in 28 CFR Part 69

Administrative practice and procedures, Contract programs, Grant programs, Loan programs, Lobbying, Reporting and recordkeeping requirements.

Title 28 of the Code of Federal Regulations is amended as set forth below.

Dick Thornburgh,

Attorney General.

Part 69 is added to read as set forth at the end of the common preamble.

PART 69—NEW RESTRICTIONS ON LOBBYING

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3711, *et seq* (as amended), Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601, *et seq* (as amended), Victims of Crime Act of 1984, 42 U.S.C. 10601, *et seq* (as amended); 18 U.S.C. 4042; and 18 U.S.C. 4351–4353.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF LABOR

29 CFR Part 93

FOR FURTHER INFORMATION CONTACT: Adam W. Hare, Room S–1522, U.S. Department of Labor, Washington, DC 20210. Telephone: (202) 523–9174.

List of Subjects in 29 CFR Part 93

Contract programs, Grant programs, Loan programs, Lobbying.

Title 29 of the Code of Federal Regulations is amended as set forth below.

Elizabeth H. Dole,

Secretary of Labor.

Part 93 is added to read as set forth at the end of the common preamble.

PART 93—NEW RESTRICTIONS ON LOBBYING

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 5 U.S.C. 301, Reorganization Plan Number 6 of 1950.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF THE TREASURY

31 CFR Part 21

FOR FURTHER INFORMATION CONTACT: Cathy Thomas, (202) 343–0249.

List of Subjects in 31 CFR Part 21

Contract programs, Grant programs, Loan programs, Lobbying.

Title 31 of the Code of Federal Regulations is amended as set forth below.

Linda M. Combs,

Assistant Secretary (Management).

Part 21 is added to read as set forth at the end of the common preamble.

PART 21—NEW RESTRICTIONS ON LOBBYING

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 31 U.S.C. 321.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 282

FOR FURTHER INFORMATION CONTACT: Mr. F. Sobieszczyk, Office of the Deputy Director, Defense Research and Engineering (Research and Advanced Technology) (ODDDR&E/R&AT), Room 3E114, the Pentagon, telephone 202–694–0205.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Department of Defense (DoD) is adopting the following interim final rule establishing new restrictions on lobbying and will proceed with internal agency coordination, the results of which will be reflected in the final common rule. It is DoD's objective to establish uniform practices within the Office of the Secretary of Defense, the Military Departments and the Defense Agencies that would be consistent with those being established by other Executive Departments and Agencies in adopting this government-wide common rule.

List of Subjects in 32 CFR Part 282

Administrative practice and procedures, Contract programs, Grant programs, Loan programs, Lobbying, Reporting and recordkeeping requirements.

Title 32 of the Code of Federal Regulations is amended as set forth below.

Patricia H. Means,

OSD Federal Register Liaison Officer, Department of Defense.

Part 282 is added to read as set forth at the end of the common preamble.

PART 282—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
282.100 Conditions on use of funds.
282.105 Definitions.
282.110 Certification and disclosure.

Subpart B—Activities by Own Employees

282.200 Agency and legislative liaison.
282.205 Professional and technical services.
282.210 Reporting.

Subpart C—Activities by Other Than Own Employees

282.300 Professional and technical services.

Subpart D—Penalties and Enforcement

282.400 Penalties.
282.405 Penalty procedures.
282.410 Enforcement.

Subpart E—Exemptions

282.500 Secretary of Defense.

Subpart F—Agency Reports

282.600 Semi-annual compilation.
282.605 Inspector General report.

Appendix A to Part 282—Certification Regarding Lobbying

Appendix B to Part 282—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 102–121 (31 U.S.C. 1352); 5 U.S.C. Section 301; 10 U.S.C. 113.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF EDUCATION

34 CFR Part 82

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Greg Vick, (202) 732–7400.

List of Subjects in 34 CFR Part 82

Grant programs, Loan programs, Lobbying.

Title 34 of the Code of Federal Regulations is amended as set forth below.

Lauro F. Cavazos,

Secretary of Education.

Part 82 is added to read as set forth at the end of the common preamble.

PART 82—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
82.100 Conditions on use of funds.
82.105 Definitions.
82.110 Certification and disclosure.

Subpart B—Activities by Own Employees

82.200 Agency and legislative liaison.
82.205 Professional and technical services.
82.210 Reporting.

Subpart C—Activities by Other Than Own Employees

82.300 Professional and technical services.

Subpart D—Penalties and Enforcement

82.400 Penalties.
82.405 Penalty procedures.
82.410 Enforcement.

Subpart E—Exemptions

82.500 Secretary of Defense.

Subpart F—Agency Reports

82.600 Semi-annual compilation.
82.605 Inspector General report.

Appendix A to Part 82—Certification Regarding Lobbying

Appendix B to Part 82—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 20 U.S.C. 3474.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 45

FOR FURTHER INFORMATION CONTACT: Mrs. Lynn H. Covington, Director, Paperwork Management and Regulations Service (70Y73), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233–3616.

List of Subjects in 38 CFR Part 45

Administrative practices and procedures, Contract programs, Grant programs, Loan programs, Lobbying.

Title 38 of the Code of Federal Regulations is amended as set forth below.

Edward G. Derwinski,

Secretary of Veterans Affairs.

Part 45 is added to read as set forth at the end of the common preamble.

PART 45—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
45.100 Conditions on use of funds.
45.105 Definitions.
45.110 Certification and disclosure.

Subpart B—Activities by Own Employees

45.200 Agency and legislative liaison.
45.205 Professional and technical services.
45.210 Reporting.

Subpart C—Activities by Other Than Own Employees

45.300 Professional and technical services.

Subpart D—Penalties and Enforcement

45.400 Penalties.
45.405 Penalty procedures.
45.410 Enforcement.

Subpart E—Exemptions

45.500 Secretary of Defense.

Subpart F—Agency Reports

45.600 Semi-annual compilation.
45.605 Inspector General report.

Appendix A to Part 45—Certification Regarding Lobbying

Appendix B to Part 45—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 38 U.S.C. 210(c).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 34

FOR FURTHER INFORMATION CONTACT: Richard Mitchell, Grants Administration Division (PM–216F), (202) 245–4078 (This is not a toll free number.)

List of Subjects in 40 CFR Part 34

Contract programs, Grant programs, Loan programs, Lobbying, Reporting and recordkeeping requirements.

Title 40 of the Code of Federal Regulations is amended as set forth below.

Dated: February 9, 1989.

William K. Reilly,

Administrator.

Part 34 is added to read as set forth at the end of the common preamble.

PART 34—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Appendix A to Part 34—Certification Regarding Lobbying

Appendix B to Part 34—Disclosure Form to Report Lobbying

Authority: Section 319; Public Law 101–121 (31 U.S.C. 1352); 33 U.S.C. 1251 et seq.; 42 U.S.C. 7401 et seq.; 42 U.S.C. 6901 et seq.; 42 U.S.C. 300f et seq.; 7 U.S.C. 136 et seq.; 15 U.S.C. 2601 et seq.; 42 U.S.C. 9601 et seq.; 20 U.S.C. 4011 et seq.; 33 U.S.C. 1401 et seq.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

GENERAL SERVICES ADMINISTRATION

41 CFR Part 105–69

FOR FURTHER INFORMATION CONTACT: Ida M. Ustad at 202–566–1224 (FTS 566–1224).

List of Subjects in 41 CFR Part 105–69

Grant programs, Lobbying.

Title 41 of the Code of Federal Regulations is amended as set forth below.

Richard G. Austin,

Acting Administrator.

Part 105–69 is added to read as set forth at the end of the common preamble.

PART 105–69—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Appendix A to Part 105–69—Certification Regarding Lobbying

Appendix B to Part 105–69—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 40 U.S.C. 486(c).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF THE INTERIOR

43 CFR Part 18

RIN 1090–AA26

FOR FURTHER INFORMATION CONTACT: Ceceil Coleman at (202) 343–6431.

ADDITIONAL SUPPLEMENTARY INFORMATION: The Department of the Interior will be using DI 1963 (Jan 90) "Certification Regarding Lobbying Form," for Federal contracts, grants, and cooperative agreements exceeding $100,000 as required by § 18.110. The "Statement for Loan Guarantees and Loan Insurance Form," DI 1962 (Jan 90) will be used for loan guarantees and loan insurance exceeding $150,000 as required by § 18.110. This certification and statement are identical to that included in the Office of Management and Budget (OMB) interim final guidance, dated December 18, 1989.

Under Section 18.405, penalty procedures to be used will be based on the Department's implementation of the Program Fraud and Civil Remedies Act of 1985 which is found at 43 CFR part 35.

List of Subject in 43 CFR Part 18

Contract programs, Cooperative agreements, Grant programs, Loan programs, Lobbying.

Title 43 of the Code of Federal Regulations is amended as set forth below.

Dated: February 15, 1990.

Lou Gallegos,

Assistant Secretary, Policy, Budget and Administration.

1. Part 18 is added to read as set forth at the end of the common preamble.

PART 18—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

18.600 Semi-annual compilation.
18.605 Inspector General report.

Appendix A to Part 18—Certification Regarding Lobbying

Appendix B to Part 18—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law. 101–121 (31 U.S.C. 1352); 5 U.S.C. 301.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

2. Part 18 is further amended as follows:

a. Section 18.405 is amended by adding paragraph (a) to read as follows:

§ 18.405 Penalty procedures.

* * * * *

(a) The Department of the Interior implementation of the Program Fraud and Civil Remedies Act of 1985 is found at 43 CFR part 35.

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 18

FOR FURTHER INFORMATION CONTACT: Arthur E. Curry, Chief, Policy Division, Office of the Comptroller, (202) 646–3718.

List of Subjects in 44 CFR Part 18

Contract programs, Grant programs, Loan programs, Lobbying.

Title 44 of the Code of Federal Regulations is amended as set forth below.

Arthur E. Curry,

Chief, Policy Division, Office of the Comptroller.

Part 18 is added to read as set forth at the end of the common preamble.

PART 18—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
18.100 Conditions on use of funds.
18.105 Definitions.
18.110 Certification and disclosure.

Subpart B—Activities by Own Employees

18.200 Agency and legislative liaison.
18.205 Professional and technical services.
18.210 Reporting.

Subpart C—Activities by Other Than Own Employees

18.300 Professional and technical services.

Subpart D—Penalties and Enforcement

18.400 Penalties.
18.405 Penalty procedures.
18.410 Enforcement.

Subpart E—Exemptions

18.500 Secretary of Defense.

Subpart F—Agency Reports

18.600 Semi-annual compilation.
18.605 Inspector General report.

Appendix A to Part 18—Certification Regarding Lobbying

Appendix B to Part 18—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 5 U.S.C. 551, 552, 553; 5 U.S.C. 601, *et seq.*; E.O. 12291. Reorganization Plan No. 3 of 1978, E.O. 12127, E.O. 12148, E.O. 12657, E.O. 12699.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 93

FOR FURTHER INFORMATION CONTACT: Beverly Cordova, 202–245–0377.

List of Subjects in 45 CFR Part 93

Contract programs, Grant programs, Loan programs, Lobbying.

Title 45 of the Code of Federal Regulations is amended as set forth below.

Dated: February 13, 1990.

Louis W. Sullivan,

Secretary, Department of Health and Human Services.

Part 93 is added to read as set forth at the end of the common preamble.

PART 93—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
93.100 Conditions on use of funds.
93.105 Definitions.
93.110 Certification and disclosure.

Subpart B—Activities by Own Employees

93.200 Agency and legislative liaison.
93.205 Professional and technical services.
93.210 Reporting.

Subpart C—Activities by Other Than Own Employees

93.300 Professional and technical services.

Subpart D—Penalties and Enforcement

93.400 Penalties.
93.405 Penalty procedures.
93.410 Enforcement.

Subpart E—Exemptions

93.500 Secretary of Defense.

Subpart F—Agency Reports

93.600 Semi-annual compilation.
93.605 Inspector General report.

Appendix A to Part 93—Certification Regarding Lobbying

Appendix B to Part 93—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 5 U.S.C. 301.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

NATIONAL SCIENCE FOUNDATION

45 CFR Part 604

FOR FURTHER INFORMATION CONTACT: Jodi Condes, 357–7880.

List of Subjects in 45 CFR Part 604

Contract programs, Grant programs, Loan programs, Lobbying.

Title 45 of the Code of Federal Regulations is amended as set forth below.

William S. Kirby,

Procurement Executive.

Part 604 is added to read as set forth at the end of the common preamble.

PART 604—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.
604.100 Conditions on use of funds.
604.105 Definitions.
604.110 Certification and disclosure.

Subpart B—Activities by Own Employees

604.200 Agency and legislative liaison.
604.205 Professional and technical services.
604.210 Reporting.

Subpart C—Activities by Other Than Own Employees

604.300 Professional and technical services.

Subpart D—Penalties and Enforcement

604.400 Penalties.
604.405 Penalty procedures.
604.410 Enforcement.

Subpart E—Exemptions

604.500 Secretary of Defense.

Subpart F—Agency Reports

604.600 Semi-annual compilation.
604.605 Inspector General report.

Appendix A to Part 604—Certification Regarding Lobbying

Appendix B to Part 604—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 42 U.S.C. 1870.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

NATIONAL FOUNDATION ON THE ARTS OF THE HUMANITIES

National Endowment for the Arts

45 CFR Part 1158

FOR FURTHER INFORMATION CONTACT: Larry Baden, Grants Officer, 202–682–5403.

List of Subjects in 45 CFR Part 1158

Contract programs, Grant programs, Loan programs, Lobbying.

Title 45 of the Code of Federal Regulations is amended as set forth below.

Cynthia Rand,

Deputy Chairman for Management.

Part 1158 is added to read as set forth at the end of the common preamble.

PART 1158—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Appendix A to Part 1158—Certification Regarding Lobbying

Appendix B to Part 1158—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 20 U.S.C. 959.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

National Endowment for the Humanities

45 CFR Part 1168

FOR FURTHER INFORMATION CONTACT: David J. Wallace (202) 786–0494.

List of Subjects in 45 CFR Part 1168

Contract programs, Grant programs, Loan programs, Lobbying.

Title 45 of the Code of Federal Regulations is amended as set forth below.

Lynne V. Cheney,

Chairman, National Endowment for the Humanities.

Part 1168 is added to read as set forth at the end of the common preamble.

PART 1168—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Appendix A to Part 1168—Certification Regarding Lobbying

Appendix B to Part 1168—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 20 U.S.C. 959 (a) (1).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

ACTION

45 CFR Part 1230

FOR FURTHER INFORMATION CONTACT: Margaret M. McHale, Telephone (202) 634–9150.

List of Subjects in 45 CFR Part 1230

Contract programs, Grant programs, Loan programs, Lobbying.

Title 45 of the Code of Federal Regulations is amended as set forth below.

Jane Kenny,

Director, ACTION.

Part 1230 is added to read as set forth at the end of the common preamble.

PART 1230—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Appendix A to Part 1230—Certification Regarding Lobbying

Appendix B to Part 1230—Disclosure Form to Report Lobbying

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); Public Law 93–113; 42 U.S.C. 4951, et seq; 42 U.S.C. 5060.

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 20

RIN 2105-AB57

FOR FURTHER INFORMATION CONTACT: Robert G. Taylor, Department of Transportation, Office of Acquisition and Grant Management—M–62, 400 Seventh Street, SW., Room 9401, Washington, DC 20590, (202) 366–4286.

List of Subjects in 49 CFR Part 20

Contract programs, Grant programs, Loan programs, Lobbying.

Title 49 of the Code of Federal Regulations is amended as set forth below.

Issued this 16th day of February 1990 at Washington, DC.

Samuel K. Skinner,

Secretary of Transportation.

Part 20 is added to read as set forth at the end of the common preamble.

PART 20—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

Subpart B—Activities by Own Employees

Subpart C—Activities by Other Than Own Employees

Subpart D—Penalties and Enforcement

Subpart E—Exemptions

Subpart F—Agency Reports

Authority: Section 319, Public Law 101–121 (31 U.S.C. 1352); 49 U.S.C. 322(a).

Cross reference: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

[FR Doc. 90–4117 Filed 2–23–90; 8:45 am]

BILLING CODES 3410–01–M; 6450–01–M; 6690–01–M; 8025–01–M; 7510–01–M; 3510–FE–M; 8120–01–M; 4710–24–M; 6116–01–M; 6051–01–M; 8230–01–M; 3210–01–M; 4210–32–M; 4410–18–M; 4510–23–M; 4810–25–M; 3801–01–M; 4000–01–M; 3820–01–M; 6560–50–M; 6820–61–M; 4310–RF–M; 6718–01–M; 4150–04–M; 7555–01–M; 7537–01–M; 7536–01–M; 6050–28–M; 4910–62–M

federal register

Monday
February 26, 1990

Part IV

Department of Transportation

Research and Special Programs Administration

49 CFR Part 171 et al.

Formal Interpretation of Regulations Issued Under the Hazardous Materials Transportation Act; Interpretations of Regulations

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173, 174, 175, 176, 177, 178, 179, and 180

[Notice No. 90-2]

Formal Interpretation of Regulations Issued Under the Hazardous Materials Transportation Act

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Interpretations of regulations.

SUMMARY: This notice publishes the formal interpretations of the Hazardous Materials Regulations (HMR) (49 CFR parts 171–180) issued under the Hazardous Materials Transportation Act (HMTA) (Pub. L. 93–633, 49 App. U.S.C. 1801–1803). These interpretations have been rendered by the Chief Counsel of RSPA. This Notice is being published to facilitate better public understanding and awareness of these interpretations. It may be particularly useful to industry members and state and local governmental officials involved in or regulating hazardous materials transportation.

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590–0001 (Tel. (202) 366–4400).

SUPPLEMENTARY INFORMATION: As part of its implementation of the HMTA, RSPA issues the regulations contained in the HMR. Informal interpretations of the HMR frequently are issued by the Standards Division of RSPA's Office of Hazardous Materials Transportation (OHMT).

Less frequently, RSPA's Chief Counsel issues formal interpretations of the HMR. These interpretations generally involve multimodal issues and are coordinated with other DOT agencies which, together with RSPA, enforce the HMTA. (Those agencies are the U.S. Coast Guard, Federal Aviation Administration, Federal Highway Administration and the Federal Railroad Administration.)

Publication of these interpretations should promote a better understanding of the HMR and improved compliance therewith. These opinions are available, and future interpretations will be available on OHMT's Hazardous Materials Information Exchange (HMIX) (1–800–367–9592).

Issued in Washington, DC, on February 16, 1990, under the authority delegated in 49 CFR part 106, appendix A.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

[Int. No. 87–1–RSPA]

Issued: February 2, 1987.

Source: Illinois Department of Transportation.

Facts: The Illinois DOT requests an interpretation to clarify the relationship between 49 CFR 172.504(c) and 172.505 as applicable to the placarding of materials which are subject to the "Poison-Inhalation Hazard" shipping paper description. § 172.504(c) excepts from placarding transport vehicles and freight containers that carry less than 1,000 pounds of a Table 2 hazardous material. However, § 172.504(c) additionally states: "This paragraph does not apply to * * * transport vehicles and freight containers subject to § 172.505". Section 172.505 states: "Each transport vehicle and freight container * * * must be placarded POISON * * * in addition to the placards required by § 172.504." The Illinois DOT interprets these regulations as excluding § 172.505 materials from the 1,000 pound placarding exception for transport vehicles and freight containers, and a material so defined must be placarded POISON pursuant to § 172.505, in addition to any other required hazard class placard. Illinois' first inquiry is whether its interpretation of §§ 172.504(c) and 172.505 is correct. Illinois specifically asks, what placards are necessary for a truck that carries one 55 gallon drum of flammable liquid hazardous material which also meets the poison-inhalation hazard definition. Lastly, Illinois inquires about placard requirements on a transport vehicle which carries the aforementioned 55 gallon drum and another hazardous material of a different Table 2 hazard class that is in excess of 1,000 pounds.

Interpretation: The Illinois Department of Transportation's interpretation is correct. A shipment consisting, for example, of one drum (500 pounds) of a material classed as a flammable liquid which also poses an inhalation hazard, requires both FLAMMABLE and POISON placards under the provisions of § 172.504(a) and § 172.505, respectively. If, for example, a quantity of a corrosive material (e.g., 10 boxes weighing a total of 400 pounds) is added to the shipment then the vehicle must be placarded CORROSIVE, FLAMMABLE and POISON. The shipment is not eligible for the 1,000 pound exception in § 172.504(c) because it includes a material that is toxic by inhalation. To allow shippers and carriers to placard shipments otherwise could cause emergency response errors, since emergency response personnel, seeing placards, are likely to presume that the placards reflect the hazards of all commodities in the transport vehicle or freight container. Under the provisions of § 172.504(b), the DANGEROUS placard may be substituted for either the CORROSIVE or FLAMMABLE placards, or both, but not for the POISON placard required by § 172.505.

[Int. No. 87–2–RSPA]

Issued: March 2, 1987.

Source: Mark Swartz, Esq., Amesbury, MA.

Facts: Section 173.301 prescribes the general requirements for shipping compressed gas cylinders. Paragraph (b) of § 173.301 states: "A container charged with a compressed gas must not be shipped unless it was charged by or with the consent of the owner of the container." Mr. Swartz has two questions: (1) Is the consent of the owner necessary if the cylinder is not offered and accepted for transportation (i.e., shipped) [?] (2) Is there any specific required method (i.e., written proof) to establish the ownership of a cylinder [?]

Interpretation: Under § 173.301(b), there is no prohibition against charging a cylinder without the consent of the owner of the cylinder, provided the charged cylinder is not offered for transportation in commerce. Therefore, if a person who offers a cylinder for transportation is also the person who charged it, the question of whether that person may be held accountable in a particular case depends on whether he obtained the permission of the cylinder owner to charge the cylinder. If, for example, the refiller who offered the container for transportation received it from the owner, then permission to fill the container can be inferred under § 173.301(b). However, the refiller may be held accountable under § 173.301(b) if he offers a container for transportation that he received from a person who he "knows" is not the owner of the cylinder. Applying the definition of "knowledge" in 49 CFR 107.299, a person has the requisite knowledge when he actually knows or should have known that an individual does not own a container. Written proof of ownership is not required. To insulate oneself from liability under § 173.301(b), the person who offers the cylinder for transportation should have sufficient "objective" facts to establish that a particular person owned the container.

[Int. No. 87-3-RSPA]

Issued: Feb. 17, 1987.

Source: David H. Jett, Esq., Keller and Heckman, Washington, DC.

Facts: David H. Jett requests an interpretation to clarify paragraphs (b) and (d) of 49 CFR 173.386. Section 173.386 defines etiologic agents and the regulations applicable to their transportation. Paragraph (b) specifically states: "* * * except as provided in paragraph (d), no person may ship any material, including * * * a biological product, containing an etiologic agent unless this material is packaged and prepared for shipment in accordance with § 173.24 and [the] other applicable regulations of this subchapter." Paragraph (d), which excepts certain substances from part 173 regulations, states:

> The following substances are not subject to any [re]quirements of this subchapter if the items as packaged do not contain any material otherwise subject to the requirements of Parts 170 through 189 of this subchapter:
>
> * * * * *
>
> (2) Biological Products
>
> (3) Cultures of etiologic agents. * * *

Mr. Jett inquires whether pursuant to paragraph (b), biological products that include etiologic agents are subject to the packaging provisions of Part 173 or whether they are exempt from regulations under paragraph (d)?

Interpretation: Under paragraph (d), biological products that contain etiologic agents, but which do not contain another hazardous material are not subject to the packaging requirements of Part 173. There is a discrepancy between the language in paragraphs (b) and (d) of § 173.386. The applicability statement of paragraph (b) implies that biological products which contain etiologic agents are subject to the general packaging provisions of § 173.24 and the other requirements of the HMR. However, the exception provided in paragraph (d) is intended to exclude biological products that contain etiologic agents, but do not contain any other hazardous materials (e.g., formaldehyde, flammable liquid solvents). RSPA intends to address the discrepancy between paragraph (b) and (d) of § 173.386 in a future rulemaking action. Accordingly, biological products which contain etiologic agents, but no other hazardous material subject to the HMR, are not subject to the packaging requirements of part 173.

[Int. No. 87-4-RSPA]

Issued: Mar. 25, 1987.

Source: R.F. D'Onofrio, Regulations Coordinator, Hercules Incorporated, Wilmington, Delaware.

Facts: Hercules, Inc. requests an interpretation of "attendance" as contained in 49 CFR 174.67 and 177.834. Sections 174.67 and 177.834 are concerned with attendance requirements during the unloading of rail tank cars and motor vehicle cargo tanks, respectively. Section 174.67 specifically states in paragraph (i): "Throughout, the entire period of unloading, and while (the) car is connected to (the) unloading device, the car must be attended by the unloader." Section 174.67(a)(1) also requires that unloading operations be "performed only by reliable persons properly instructed in unloading hazardous materials and made responsible for careful compliance with this part." Section 177.834(i) announces the general requirement that motor carrier cargo tanks must be attended at all times during loading and unloading. Furthermore, paragraph (i)(3) of § 177.834 specifically defines "attends" as:

> A person "attends" the loading or unloading of a cargo tank if, throughout the process, he is awake, has an unconstructed view of the cargo tank, and is within 7.62 meters (25 feet) of the cargo tank.

Hercules proposes to install a system that includes electronic sensors which upon detection of minute levels of fumes or vapors will sound an alarm and shut down the unloading process. Also, periodic checks of the system will be conducted by workers in the general area. Hercules requests DOT to compare its proposed system to the attendance requirements of §§ 174.67 and 177.834.

Interpretation: Hercules' proposed system may comply with the requirements of § 174.67, but it does not comply with those contained in § 177.834(i)(3). The purpose of the attendance requirement is to ensure that hazardous materials are safely loaded or unloaded and that in the event of an emergency, such processes are rapidly halted. The key elements of the attendance requirements in §§ 174.67 and 177.834 are that the person or mechanical device monitoring the loading process be able to determine if a condition requiring cessation of operation occurs, and if so, that there is the ability to stop the operation.

The system proposed by Hercules meets the requirements of §§ 174.67(a)(1) and 174.67(i) if: (1) An employee is made responsible for unloading and is familiar with the nature and properties of the material being unloaded; (2) the employee responsible for unloading is instructed in the procedures to be followed during unloading and in the event of an emergency, and has the authority and ability to halt the flow of product immediately and take emergency action; (3) in the event of an emergency, the system must be capable of immediately halting the flow of product or alerting the employee responsible for unloading; (4) the monitoring device will provide immediate notification of any malfunction to the person responsible for unloading, or the device is checked hourly for malfunctions; and (5) in case of malfunction, the device will no longer be relied upon and instead the individual responsible for unloading will constantly observe the unloading.

Hercules' proposed system is acceptable under § 174.67, assuming that upon detection of fumes or vapors the monitoring system warns workers of the defect and automatically stops the unloading process. However, § 177.834(i)(3) specifically requires a "person" to have a continuous unobstructed view within "twenty-five feet" of the cargo tank. The motor vehicle attendance requirements are more specific than those for rail cars, because of the greater likelihood that motor vehicles will be unloaded in populated areas. Thus, an electronic monitoring device with periodic checks by workers in the "general area" does not comply with the specific attendance requirements of § 177.834(i)(3), because it utilizes non-human monitoring.

[Int. No. 87-5-RSPA]

Issued: June 2, 1987.

Source: Gordon Rousseau, Senior Technical Advisor, Lawrence W. Bierlein, P.C., Washington, DC.

Facts: Request for an interpretation of 49 CFR 173.12, regarding how § 173.12 applies to hazardous substances and poisonous materials, particularly poisonous liquids that are toxic-by-inhalation. Paragraph (a) of § 173.12 states:

> "Waste material * * * are excepted from the specification packaging requirements of this subchapter if packaged in combination packagings in accordance with this section * * * In addition, a generic proper shipping name from § 172.101 may be used in place of specific chemical names, when two or more waste materials in the same hazard class are packaged in the same outside packaging ["labpacks"], provided the waste materials are chemically compatible.

The request for interpretation involves four specific questions concerning § 173.12: (1) Does § 173.12 provide an exception to the additional poison and hazardous substance identification

requirements of § 172.203 (c) and (k); (2) Does § 173.12 apply when additional requirements are imposed by other sections (e.g., §§ 172.203, 172.301(a), 172.324); (3) How is § 173.12 affected by the marking requirements adopted under HM–196 and HM–145F; and (4) When combinations of waste stream sources are contained in the same labpack are waste stream numbers for each source to appear on the outside packaging and shipping papers[?]

Interpretation: Section 173.12 provides exceptions for shipments of waste materials and allows the use of "labpacks." However, § 173.12 does not relieve shippers of all the requirements of the Hazardous Materials Regulations [HMR], and there are limitations on the use of the exceptions in that section. First, § 173.12 is not intended to provide an exception from the description requirements of either paragraphs (c) or (k) of § 172.203. Second, § 173.12 does not grant relief from specific shipping paper and marking requirements such as those contained in §§ 172.203, 172.301, and 172.324. Moreover, regardless of § 173.12, materials that meet the toxic-by-inhalation requirements of § 173.3a pose extreme safety hazards and must be packaged as prescribed in § 173.3a. Third, § 173.12 does not provide exceptions from the requirements adopted under HM–196 and HM–145F. Under HM–145F, each hazardous substance contained in a "labpack" must be identified as required by § 172.324. Generic shipping names may be used only if the specific chemical names required by §§ 172.203 and 172.324 are included in the shipping descriptions. Last, if samples of different waste streams are contained within a labpack, each stream must be identified with the appropriate waste stream number on the shipping papers and the outside packages.

[Int. No. 87–6–RSPA]

Issued: Aug. 6, 1987.

Sources:

Paul R. Counterman, P.E., Chief, Bureau of Hazardous Waste Technology, Division of Solid & Hazardous Waste, New York State Department of Environmental Conservation, Albany, New York.

Neil M. Gingold, General Counsel, Envirosure Management Corp., Buffalo, New York.

Facts: Both parties have requested clarification of the applicability of 49 CFR 173.28 (a) and (m) to the operations of a hazardous waste processing facility located in Niagara Falls, New York. Frontier Chemical Waste Process, Inc., a subsidiary of Envirosure Management Corp., receives drums of flammable waste, partially or completely empties them (often removing liquids and leaving sludge or solids in the bottom of the drums), refills the drums with flammable solids or sludges (conceded by the Company to be "flammable solids" under § 173.150) for purposes of consolidation, and ships them to a disposal site. In some instances, State personnel have required compliance with §§ 173.28 (a) and (m). There is disagreement concerning whether all of the refilled and reused drums are emptied before being refilled. Both parties have requested interpretations concerning the applicability of §§ 173.28 (a) and (m) to these facts. This interpretation also addresses a related provision, § 173.28(p).

Interpretation: Section 173.28 applies only to certain reuses of containers. The general reuse requirements of § 173.28(a) apply only where a contajner has been refilled and reshipped "after having been previously emptied." The specific steel drum reuse requirements of § 173.28(m) apply only to DOT specification 17C, 17E, and 17H steel drums "from which contents have been removed." The quoted phrases in the two paragraphs are synonymous; they require, respectively, the emptying insofar as practicable of, and removal insofar as practicable of the contents from, the container before the reuse requirements apply. Neither § 173.28(a) nor § 173.28(m) applies in blending or mixing situations where some contents have been removed and others added. After a container has been emptied insofar as practicable, however, § 173.28(a) imposes requirements which must be met as prerequisites to the container's use for the transportation of hazardous materials.

Similarly, § 173.28(m) specifies requirements which certain specification 17C, 17E and 17H steel drums which have been emptied insofar as practicable must meet as prerequisites to their use for the transportation of specified hazardous materials.

An example of "emptying insofar as practicable" is turning drums upside down and thereby draining out most of their contents. Section 173.28(p) contains alternative provisions for NRC or STC container reuse solely for the shipment of hazardous waste to designated facilities. That paragraph does not require that containers be emptied as a prerequisite to its application; it applies to the specified reuse for hazardous waste shipments regardless of whether the NRC or STC containers have been emptied.

[Int. No. 88–1–RSPA]

Issued: May 16, 1988.

Source: Clifford J. Harvison, President, National Tank Truck Carriers, Inc., Alexandria, Virginia.

Facts: National Tank Truck Carriers, Inc. (NTTC) takes issue with a major oil company shipper of hazardous materials which recently commented in a DOT rulemaking docket as follows:

> While we (the major oil company) may supply HM, we are not necessarily the shipper because the product was sold 'at the rack'. This means we sold it as it was transferred from a pipe or hose into the truck's cargo tank. Our customer, the 'shipper', arranged transportation.

NTTC disagrees with the apparent conclusion that transfer of ownership of a hazardous material concurrent with or prior to physical loading of the hazardous material into a truck's (or vessel's) cargo tank transfers HMTA shipper responsibilities (under 49 CFR 173.22 and other regulations under the HMTA) from the seller (which may own the storage tank, pipe or hose from which the material is being loaded) to the buyer of the material. In addition, NTTC states that, regardless of who owns the cargo tank into which the hazardous material is transferred, the transfer of ownership has no bearing on the "shipper" responsibilities under the Hazardous Materials Regulations (HMR) and thus the original owner, the oil company, remains liable as the "shipper".

Interpretation: The word "shipper" is not specifically defined in the HMR (49 CFR parts 170–179), due primarily to the fact that it is not possible for the Department to account for the numerous commercial arrangements that may exist under that concept. Although the word "shipper" does appear, it is used in an ordinary layman's manner rather than as a specific, technical term of art. Consequently, responsibilities generally are placed on "offerors" for performance of the functions associated with "offering" hazardous materials for transportation (e.g., see the general duty and applicability provisions in §§ 171.1, 171.2, 172.3, and 173.1).

The key issue in determining the regulatory responsibilities under the requirements in parts 171, 172, and 173 is determining which parties perform which functions. This involves a case-by-case determination based upon all relevant facts. Any person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned by the HMR to the offeror, is legally

responsible under the HMR for the proper performance of those functions. Any person's performance or attempted performance of any "offeror" functions may be evidence of that person's responsibility for performance of other "offeror" functions. In many cases, more than one person may be responsible for performing, or attempting to perform, "offeror" functions, and each such person may be held jointly and severally accountable for all or some of the "offeror" responsibilities under the HMR. (Note that responsibilities for compliance may be expressed in terms other than "offeror" or "offering" (e.g., preparers of hazardous materials for shipment, § 173.1(a)(2), and other persons performing required functions § 173.1(c)).)

Application of these principles to the situation described by the NTTC could result in the oil company or the purchaser (or the carrier if different than the purchaser) being held legally responsible for compliance with requirements associated with offering hazardous materials for transportation. That determination would require consideration of all relevant facts, including ownership of the materials, functions performed or undertaken by the parties, past practices of the parties, and contractual arrangements among the parties. No single factor, however, conclusively determines legal responsibility for performance of "offeror" functions under the HMR. For example, transfer of ownership of the hazardous materials from the oil company to the purchaser does not, in itself, absolve the oil company of responsibility under the HMR for performance of "offeror" functions or impose them upon the purchaser. On the other hand, the oil company's original ownership does not necessarily result in the oil company being responsible under the HMR for performance of all "offeror" functions. The ownership of the hazardous materials before, during or after the transportation of hazardous materials is only one of the many relevant factors which must be considered in determining regulatory liability under the HMR.

[Int. No. 89–1–RSPA]

Issued: Apr. 14, 1989.

Source: Clifford J. Harvison, President, National Tank Truck Carriers, Inc., Alexandria, Virginia.

Facts: National Tank Truck Carriers, Inc. (NTTC) has requested a follow-up interpretation to Int. No. 88–1–RSPA concerning persons responsible as "offerors" (or "shippers") under regulations issued pursuant to the Hazardous Materials Transportation Act (HMTA).

The essence of Int. No. 88–1–RSPA is as follows:

> Any person who performs, attempts to perform, or, under the circumstances involved, is contractually or otherwise responsible to perform, any of the functions assigned to the offeror or shipper by the HMR is legally responsible under the HMR for their proper performance. Performance or attempted performance of any offeror or shipper functions may be evidence of responsibility under the HMR for performance of other offeror or shipper functions. No single commercial act, such as a sale or transfer of ownership, is necessarily determinative of that responsibility.

NTTC's request also recognizes that the earlier Interpretation stated that the key issue in determining regulatory responsibilities under the Hazardous Materials Regulations (HMR), 49 CFR parts 171–179, is determining which parties perform which functions and that this involves a case-by-case determination based on all relevent facts.

Accepting that premise and recognizing that answers to detailed hypothetical questions may not be appropriate or applicable to actual cases occurring in the future, NTTC nevertheless sets forth a series of hypothetical fact patterns and requests answers to questions concerning them.

Many of NTTC's questions seem to assume erroneously that there is only one offeror in any given fact situation. In actuality there may be one or more efferors, jointly and severally responsible for compliance with the HMR, in any transportation scenario—depending upon the details of that scenario.

Interpretation: NTTC's hypothetical fact patterns and related questions are set forth below, and each question is followed by the answer of the Research and Special Program Administration.

Fact Pattern #1

Company is engaged in the production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, the primary function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by Company A. Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets". There are no prior or existing agreements, between Company A and Company Z, regarding product ownership or taking title to the product.

Question—For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

Answer—In Fact Pattern #1, absent additional facts, Company A is an offeror of hazardous materials for transportation and, as such, is responsible for compliance for all offeror and shipper responsibilities (e.g., §§ 171.2, 172.3, 173.1, and 173.22). Although there are no facts indicating that Company Z is an offeror, if Company Z loads its own vehicles or issues shipping papers, it would be performing offeror functions and be responsible for doing so in compliance with the HMR. Also, Company Z is a carrier and may not accept for transportation or transport hazardous materials without complying with numerous HMR provisions applicable to those functions (e.g., §§ 171.2 and 177.817).

Fact Pattern #2

Company A is engaged in the production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, the primary function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by Company A. Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets".

By prior contractual agreement, Company A agrees to permit Company Z to load its trucks (at Company A's "facilities") 24 hours a day with no representative of Company A in attendance during the loading operations. Access to Company A's facilities is accomplished by keys and/or electromechanical devices provided by Company A.

Question—For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

Answer—Company A and Company Z are both offerors. Either or both would be responsible for compliance with particular requirements of the HMR. Nothing in the given facts has relieved Company A of its responsibilities to classify the materials, prepare shipping papers, certify the shipment (§ 172.204),

and provide required placards (§ 172.507). However, if Company Z performs offeror functions, § 173.1 requires that it do so in accordance with the HMR. Such functions might include selection of proper packaging (§§ 173.22(a)(2) and 173.24) and loading (§§ 173.30 and 177.834).

The extent of the joint and several responsibility of Companies A and Z as offerors would be determined, in part, by the terms of their contract with each other.

Fact Pattern #3

Company A is engaged in production and marketing of petroleum products which are considered "flammable" and "combustible" under the Hazardous Materials Transportation Act. In order to facilitate distribution of these products, Company A operates several facilities, one function of which is to transfer these products from its own production and/or storage facilities into tank motor vehicles, owned by Company Z, for subsequent distribution to retail outlets owned or otherwise controlled by *Company M.* Company Z is a motor common carrier. Company Z's trucks are loaded at Company A's "facilities" and transport the product to the "retail outlets".

Company M is engaged in the retail and/or wholesale distribution of petroleum products under the brand names of Company A. By prior agreement between Companies A and M it is agreed that ownership of the product shall pass from Company A to Company M, *prior to* transportation from Company A's facilities. Said "prior agreement" further specifies that Company Z will provide transportation services between Company A's facilities and Company M's facilities.

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—As discussed in the Fact Pattern #1 answer, Company A is an offeror, and Company Z would be responsible for proper performance of any offeror functions which it undertakes. Company M has not become an offeror solely by virtue of its acquisition of ownership of the hazardous materials prior to transportation. If Company M directs the activities of Company A or otherwise undertakes offeror functions, Company M is responsible for their proper performance. This issue was discussed in Int. No. 88–1–RSPA:

> No single factor * * * conclusively determines legal responsibility for performance of "offeror" functions under the HMR. For example, transfer of ownership of the hazardous materials from the oil company to the purchaser does not, in itself, absolve the oil company of responsibility under the HMR for performance of "offeror" functions or impose them upon the purchaser.
>
> On the other hand, the oil company's original ownership does not necessarily result in the oil company being responsible under the HMR for performance of all "offeror" functions. The ownership of the hazardous materials before, during or after the transportation of hazardous materials is only one of many relevant factors which must be considered in determining regulatory liability under the HMR.

Fact Pattern #4

Same fact pattern as that described in #3 (above), except that the "prior agreement" stipulates that the transportation will be performed in motor vehicles owned by Company M.

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—Company A is an offeror. On the "offeror" issue, this fact pattern is the same as Fact Pattern #1, and there are no facts indicating that Company M is an offeror. If Company M directs the activities of Company A or otherwise undertakes offeror functions, Company M is responsible for their proper performance.

Fact Pattern #5

Same fact pattern as that described in #3 (above), except that the agreement specifies that Company M will "arrange for transportation."

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—Company A is an offeror. More information would be required concerning Company M's undertaking to "arrange for transportation" in order to determine to what extent, if any, Company M is an offeror. If Company M is contractually or otherwise responsible to perform any of the functions assigned by the HMR to the offeror, it is legally responsible under the HMR for the proper performance of those functions.

Fact Pattern #6

Same fact pattern as that described in #3 (above), except that the agreement specifies that Company A will "arrange for transportation".

Questions—(1) For the purposes of applicability of 49 CFR parts 170–179, is Company A the "shipper" (or "offeror")?

(2) For the purposes of applicability of 49 CFR parts 170–179, is Company M the "shipper" (or "offeror")?

Answer—Company A is an offeror. As in Fact Patterns #3 and #4, there are no facts sufficient to indicate that Company M is an offeror.

Additional Question A

Would there be any change in the determination of "shipper" (or "offeror") if the prior agreement between Companies A and M stipulated that ownership or title to the product transferred "at the time of delivery" to Company M's facilities?

Answer—Assuming that this question refers to Fact Pattern #3, Company A remains an offeror, and there is no basis on which to determine that Company M is an offeror.

Additional Question B

Would there be any change in the determination of "shipper" (or "offeror") if the prior agreement between Companies A and M stipulated that ownership or title to the product transferred "at the time of loading (or transfer)" into cargo tanks (regardless of ownership of the cargo tanks)?

Answer—Again assuming that this question refers to Fact Pattern #3, Company A remains an offeror. However, Company M has not become an offeror solely by virtue of its acquisition of ownership of the hazardous materials at the time of loading or transfer into cargo tanks—a time later than that hypothesized in Fact Pattern #3.

[FR Doc. 90–4202 Filed 2–23–90; 8:45 am]

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federal register

Monday
February 26, 1990

Part V

Department of the Interior

National Park Service

36 CFR Part 67

Historic Preservation Certifications Pursuant to Section 48(g) and Section 170(h) of The Internal Revenue Code of 1986; Rule

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Park 67

RIN 1024-AB73

Historic Preservation Certifications Pursuant to Section 48(g) and Section 170(h) of the Internal Revenue Code of 1986

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The final rule restates and makes amendments to the procedures by which owners desiring tax benefits for rehabilitation of historic properties apply for certifications pursuant to sec. 48(g) and section 170(h) of the Internal Revenue Code of 1986. These tax laws require certifications from the Secretary of the Interior in order for taxpayers to receive tax benefits. This rule establishes procedures whereby taxpayers apply for these certifications. The rule also establishes procedures to qualify historic properties for Federal income and estate tax deductions for charitable contributions of partial interests in real property.

EFFECTIVE DATES: These regulations take effect March 28, 1990.

FOR FURTHER INFORMATION CONTACT: H. Ward Jandl, Chief, Technical Preservation Services Branch, Preservation Assistance Division, (202) 343–9584, or Carol D. Shull, Chief of Registration, National Register Branch, Interagency Resources Division, (202) 343–9536, National Park Service, P.O. Box 37127, U.S. Department of the Interior, Washington, DC., 20013–7127.

SUPPLEMENTARY INFORMATION: On October 7, 1977, a final rulemaking was published in the **Federal Register** (42 FR 54548) to amend title 36 of the Code of Federal Regulations by adding a new part 67 concerning historic preservation certifications made by the Secretary of the Interior pursuant to the Tax Reform Act of 1976 (Pub. L. 94–455, 90 Stat. 1519). Between February 1978 and June 1981, this rulemaking was designated and transferred to title 36 CFR part 1208.

On November 6, 1978, the Revenue Act of 1978 (Pub. L. 95–600, 92 Stat. 2828) became law, necessitating amendments to the regulations. Section 701(f) of this act clarified portions of section 2124 of the Tax Reform Act of 1976, while section 315 provided an investment tax credit to encourage the rehabilitation of older buildings. Certifications of rehabilition by the Secretary were required if an owner chose to elect the tax credit when the building was a "certified historic structure." On December 19, 1980, a final rulemaking was published in **Federal Register** (45 FR 83488) incorporating these changes from the Revenue Act of 1978.

On December 17, 1980, the Tax Treatment Extension Act of 1980 (Pub. L. 96–541, 94 Stat. 3204) became law, providing a three-year extension of tax provisions relating to historic preservation and revising and making permanent rules allowing deductions for charitable contributions of qualified interests in real property for conservation purposes. On August 31, 1981, the Economic Recovery Tax Act of 1981 (Pub. L. 97–34, 95 Stat. 172) became law, replacing existing tax incentives for historic buildings with a new 25 percent investment tax credit and repealing and replacing certain tax provisions contained within the Tax Reform Act of 1976 and the Revenue Act of 1978. Additional modifications to the tax credits were made in the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. 97–248), signed into law September 3, 1982. On March 12, 1984, a final rulemaking was published in the **Federal Register** (49 FR 9302) to incorporate changes brought about by the legislation described above and to modify the certification process, including the establishment of a fee system for the processing and review of rehabilitation certification requests.

On October 22, 1986, the Tax Reform Act of 1986 (Pub. L. 99–514, 100 Stat. 2085) became law, replacing existing tax incentives for historic buildings with a 20 percent investment tax credit. However, the certification process a taxpayer must follow remains generally the same as under earlier laws cited above and under previous regulations. The taxpayer continues to complete an application form, which is then reviewed by the State Historic Preservation Officer (SHPO) and the National Park Service (NPS). Notification as to certification continues to be made by the NPS after considering the recommendations of SHPOs. In such cases the recommendations of SHPOs are generally followed, but by law all certification decisions are made by the Secretary, and the decision of the Secretary may differ from the recommendation of the SHPO.

On May 23, 1988, a proposed rulemaking was published in the **Federal Register** (53 FR 18292) to incorporate changes brought about by the Tax Reform Act of 1986 (Pub. L. 99–514, 100 Stat. 2085), to clarify certain aspects of the certification process, and to modify slightly the language of the Secretary of the Interior's Standards for Rehabilitation while retaining their basic preservation principles. Such modifications do not affect materially the existing requirements of the Standards or these regulations.

To permit a public understanding of the tax consequences of certifications made by the Secretary of the Interior, the following are general descriptions of the tax provisions contained in both current and prior laws. The term "depreciable property" as used in these descriptions means those properties subject to the allowance for depreciation under section 167 of the Internal Revenue Code and generally excludes owner-occupied homes.

The following general description is given of the tax provisions contained in sec. 2124 of the Tax Reform Act of 1976:

1. Section 2124(a). (Section 191 of the Internal Revenue Code of 1954). Permitted a 60-month amortization of certain rehabilitation expenses made in connection with qualified depreciable properties. This provision was repealed by the Economic Recovery Tax Act of 1981 and expired on December 31, 1981;

2. Section 2124(b). (Section 280B of the Code). Disallowed a deduction for demolition expense of qualified depreciable properties. This provision applied to demolitions beginning after June 30, 1976, and before January 1, 1984;

3. Section 2124(c). (Section 167(n) of the Code). Generally precluded accelerated depreciation for buildings built on the site of qualified depreciable properties. This provision was repealed by the Economic Recovery Tax Act of 1981 and expired on December 31, 1981;

4. Section 2124(d). (Section 167(o) of the Code). Provided special depreciation rules for qualified rehabilitated property. This provision was repealed by the Economic Recovery Tax Act of 1981 and expired on December 31, 1981;

5. Section 2124(e). (Sections 170(f)(3) and 170(h), 2055(e)(2) and 2522(c)(2) of the Code). Amended charitable contribution deductions on income, estate, and gift taxes to liberalize deductions for conservation purposes including the preservation of historically important land areas or certified historic structures.

The following general description is given of the tax provisions contained in section 315 of the Revenue Act of 1978:

1. Section 315. (Section 38 and section 48 of the Code). Permitted an investment tax credit for expenses incurred in rehabilitation certain depreciable properties. The provision was replaced effective January 1, 1982.

The following general description is given of the tax provisions contained in section 6 of the Tax Treatment Extension Act of 1980:

1. Section (Section 170(f)(3) and section 170(h) of the Code). Permits charitable contribution deductions for income, estate, and gift taxes for qualified conservation contributions including contributions of a qualified real property interest in a historically important land area or certified historic structure.

The following general description is given of the tax provisions contained in section 212 and section 214 of the Economic Recovery Tax Act of 1981:

1. Section 212(a). (Section 46(b) and section 48(g) of the Code). Permitted a 25 percent investment tax credit on rehabilitation expenses incurred in connection with certified rehabilitation of a certified historic structure.

This provision was replaced effective January 1, 1987, with a 20 percent investment tax credit described below.

2. Section 212(b). (Sec. 48(g) of the Code). Precluded use of a 15 percent (buildings 30–39 years old) or 20 percent (buildings 40 years or older) investment tax credit for a rehabilitation of a building within a registered historic district unless the building is certified as not being of historic significance to the district.

3. Section 212(d). Repealed secs. 167(n), 167(o), and 191 of the Code effective January 1, 1982.

The following general description is given of the tax provisions contained in sec. 251 of the Tax Reform Act of 1986, which also redsignated the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986:

1. Section 251(a). (sec. 46(b) and sec. 48(g) of the Internal Revenue Code of 1986). Permits a 20 percent investment tax credit on rehabilitation expenses incurred from January 1, 1987, in connection with a certified rehabilitation of a certified historic structure.

2. Section 251(b). (sec. 48(g) of the Code). Precludes use of a 10 percent (buildings built before 1936) investment tax credit for a rehabilitation of a certified historic structure, including buildings within a registered historic distict, unless the building is certified as not being of historic significance to the district.

The provisions described above require the Secretary of the Interior to make one or more of the following classes of certifications:

a. Certified Historic Structures. All the tax provisions described above are related to so-called certified historic structures, which are defined as qualified depreciable buildings that either are listed in the National Register or are located within a registered historic district and certified by the Secretary as contributing to the historic significance of the district. For purposes of other rehabilitation tax credits available under section 48(g) of the Internal Revenue Code, any building located in a registered historic district is considered a certified historic structure unless the Secretary of the Interior has determined that the building is not of historic significance to the district.

b. Certified Rehabilitations. In order for the tax consequences relating to rehabilitation to accrue, the Secretary must determine not only that the rehabilitation was undertaken on a certified historic structure but also that it meets certain standards with respect to the preservation of its historic character.

c. Certified Statutes and certified State or Local Historic Districts. Qualified historic buildings located in historic districts designated under a statute of an appropriate State or local government are subject to the tax consequences discussed above if the statute is certified by the Secretary as containing criteria which will substantially achieve the purposes of preserving and rehabilitating buildings of historic significance to the district and if the district is certified by the Secretary as meeting substantially all the requirements for the listing of districts in the National Register.

Section 6 of the Tax Treatment Extension Act of 1980 (Sec. 170(h)(4) of the Code), which explains what properties may qualify for the allowance of deductions for contributions of partial interests in property, lists four definitions for the term "conservation purpose." The last of these is "the preservation of a historically important land area or a certified historic structure." For purposes of this provision, the term "certified historic structure" encompasses both depreciable and nondepreciable structures such as owner-occupied residences.

Historic structures within registered historic districts may qualify for charitable contributions through the certification of historic significance process (sec. 67.4). This requirement is consistent with the provisions of the law.

Comments and Response to Comments on the May 23, 1988, Publication of Proposed Rules

Twenty-seven comments were received in response to the proposed regulations from a broad spectrum of States, non-profit preservation organizations, and private individuals. Most of these comments focused on the proposed modifications to the Secretary of the Interior's Standards for Rehabilitation. A number of the comments on the Standards for Rehabilitation suggested that there had been insufficient public participation in the development of the modified Standards and that further public comment should be sought prior to incorporation of the Standards into a final rule. The comments on the proposed revisions to the procedures for certifications of significance and rehabilitation were primarily editorial suggestions although six comments proposed elimination of the user fees for owners seeking certification of rehabilitation work. Many of the suggested revisions to both the Standards for Rehabilitation and the procedures for certifications have been incorporated into the final rule. The comments received and the Secretary's position are discussed under the most appropriate section.

Paragraph 67.1(b): Two comments suggested that any new procedural requirements should not apply to pending certification applications, particularly the requirement for submission of part 1 for properties individually listed in the National Register that contain more than one building. The paragraph was revised and an exception stated at § 67.4(d)(2) that submission of part 1 in such circumstances would be required as the effective date of the final rule.

Paragraph 67.1(c): Two comments expressed concern about the implications for receipt of Historic Preservation Fund grants in the event States chose not to participate in the review of requests for certification. This aspect of the Historic Preservation Fund grant-in-aid program is covered in detail elsewhere in Department of the Interior regulations and National Park Service Historic Preservation Fund grant procedures. Inasmuch as 36 CFR part 67 is intended to provide procedures whereby taxpayers apply for certifications required by the Internal Revenue Code, the Department does not believe it is necessary to incorporate reference to the requirements of the Historic Preservation Fund grant-in-aid program in this part. Two comments concerning the status of the SHPO as acting on behalf of the State and not as an agent incorporate reference to the requirements of the Historic Preservation Fund grant-in-aid program in this part. Two comments concerning the status of the SHPO as acting on behalf of the State and not as an agent of the Federal government were received: One strongly supporting this section and the other requesting that the

statement that the SHPO is not an agent of the Federal government be deleted. Accordingly, the language of this paragraph was revised to continue to spell out the independent role of the SHPOs while eliminating the phrase "agent of the Federal Government".

Section 67.2 Definitions.

Certified Historic Structure Three comments were received that supported the inclusion of the phrase "site and environment" as an integral part of a certified historic structure but suggested editorial clarification as to the scope of review for purposes of the certification decisions under this part was necessary. Accordingly, the definition of certified historic structure has been revised to clarify that the NPS decision on listing a property in the National Register of Historic Places does not limit the scope of review of a rehabilitation project for certification purposes and such review encompasses the entire resource as it existed prior to rehabilitation and any related new construction.

Property A new definition of "property" was added to describe the relationship between a certified historic structure and its site and landscape features. Particularly, the term "property" has generally been substituted for "building" throughout except where the term "building" is appropriate. The term "structure" remains where "certified historic structure" is intended.

Section 67.3 Introduction to certifications of significance and rehabilitation and information collection.

A number of comments were received suggesting that this paragraph and §§ 67.4(c) and 67.6(a)(1) specify that owners are required to submit two copies of the Historic Preservation Certification Application and supporting documentation, one to be retained by the SHPO and the other to be forwarded to the NPS regional office. The paragraph was revised to advise owners that normally two copies of the application are required.

One comment suggested that the system of "expedited review" contained in existing regulations be retained as part of this rule. The Department takes the position that the elimination of the expedited review system is warranted because of the increased reliance by the NPS on the recommendations from *all* SHPOs providing evidence of a thorough review of Historic Preservation Certification Applications.

One comment suggested that the language regarding preliminary determinations of significance be clarified to eliminate any possible confusion that an owner would receive a separate certification of significance from the NPS regional office at the time of listing of a building or historic district in the National Register. Accordingly, with respect to all categories of preliminary determinations of significance, this paragraph and § 67.4 have been revised to state that preliminary determinations of significance "become" final as of the date of listing of the building or the historic distict or the amendment of an existing registered historic district in the National Register.

Paragraph 67.3(b)(4): One comment suggested making the review time periods binding and allowing an applicant to assume approval if review comments were not provided within the 60-day time frame specified (30 days at State level and 30 days at the Federal level). Because section 48(g) of the Internal Revenue Code requires the Secretary of the Interior to make certifications to the Secretary of the Treasury regarding rehabilitations in order for a texpayer to be eligible for the tax incentives, the Department believes that there can be no presumption of certification of a rehabilitation in the event the applicant has not received a response within a specified time. While the review time periods are not binding, they are monitoried closely by the NPS and adhered to in the majority cases. Further, the regulations provide a procedure in paragarph 67.3(b)(6) for bringing delays in review to the attention of the Secretary. Therefore, no change to the regulation was determined necessary in response to this comment.

Paragraph 67.3(b)(5): A number of comments were concerned about the descriptions in the application forms taking precedence over supplementary material in the event of discrepancies and consequently how much additional information would have to be included in the application form itself. This paragraph was revised to specify that an attempt would be made to resolve discrepancies with the applicant prior to a certification ruling, but in the event that the discrepancy is not resolved or is not noticed, the descriptions in the application form will take precedence. The Department takes the position that since the owner must sign the application form and attest to its accuracy, the signed application form must represent the document upon which certification decisions will be based.

Section 67.3(b)(7): One comment suggested that this paragraph be clarified to state that although an owner could submit part 1 of the Historic Preservation Certification Application prior to, or with, the part 2, processing of the part 2 would not be undertaken without an adequately documented part 1 on file. As this practice is currently followed by the NPS, this paragraph has been clarified accordingly.

Section 67.4 Certifications of historic significance.

One comment suggested that the exceptions listed in paragraph 67.4(b) are not in fact exceptions and that editorial changes would make this section clearer. In the final rule the paragraphs of § 67.4 have been redesignated to clarify those procedures that govern properties located within registered historic districts, those that govern properties individually listed in the National Register, and those that apply to certifications of historic significance of all properties.

Paragraph 67.4(b)(3): One comment proposed elimination of the provision for obtaining waivers in certain circumstances for submission of a part 1 for all buildings within a property individually listed in the National Register and further clarification on the use of a part 1 to provide information that would enable determinations of significance to be made. The Department concurred that information on the physical appearance and significance of each building within the listing was necessary to determine which are of historic significance to the property and the paragraph has been reviewed accordingly and redesignated paragraph 67.4(d)(2) in the final rule.

Paragraph 67.4(b)(4): Seven comments stated that this paragraph was unclear as to how and for what time period reports of substantial damage to a certified historic structure must be reported to the Secretary. A number of the comments were concerned that the role of the SHPO and the owner's right of appeal were not specified. One comment questioned the relationship of this paragraph to the procedures in 36 CFR part 60 for removing properties from the National Register. Accordingly, this paragraph has been revised to incorporate all of these comments and redesignated paragraph 67.4(k) in the final rule.

Paragraph 67.4(f): Two comments suggested that the reference to provisions of the Internal Revenue Code regarding ignorance of an owner of a building within a registered historic district about certification requirements should be deleted because this paragraph should not call attention to this provision of the tax code. The Department takes the position that

because section 48(g) of the Internal Revenue Code specifies what is and is not a certified historic structure within a registered historic district and what the certification requirements are, this part must reflect the actual wording of the statute; consequently this paragraph has not been modified but has been redesignated paragraph 67.4(g) in the final rule.

Section 67.5 Standards for Evaluating Significance within Registered Historic Districts

Paragraph 67.5(c): One comment suggested that this paragraph be clarified to reflect actions to be taken by the Keeper of the National Register in the event the part 1 documentation contains additional relevant information on the significance of a particular building that is not included in National Register documentation. Accordingly a provision was added to permit the Keeper to issue a National Register supplementary record if circumstances warrant such an amendment.

Paragraph 67.5(e): Three comments stated that this paragraph was unclear as to when nonhistoric surface material must be removed in order for a determination of significance or nonsignificance to be made. Accordingly, this paragraph was revised to clarify that a determination of nonsignificance would not be made for a building within a registered historic district without removal of a portion of the nonhistoric surface material and that such a building would be presumed to contribute to the significance of the historic district and, therefore, be ineligible for the other tax credits under section 48(g) of the Internal Revenue Code.

Section 67.6 Certifications of rehabilitation.

Paragraph 67.6(a)(1): One comment suggested adding the statement that if sufficient documentation was not provided to permit review an evaluation of a part 2, certification would be denied and that such a denial could be appealed under § 67.10. Inasmuch as this has been NPS practice since 1984, this paragraph has been so revised.

Paragraph 67.6(b): One comment proposed reinstating the language of existing regulations that for certification purposes a rehabilitation project encompasses all work on "significant" interior and exterior features. The Department believes that a rehabilitation project encompasses all work on the certified historic structure and its site and environment and that it is the determination of the Secretary as to which features of the certified historic structure and its site and environment are significant and will be affected by the rehabilitation, related demolition, or new construction. Accordingly, this paragraph has not been revised.

Paragraph 67.6(b)(1): Three comments suggested that this paragraph be clarified to specify for what prior rehabilitation work an owner would be held responsible. An editorial change was also suggested that would separate consideration of prior rehabilitation work from the Secretary's capacity to consult with the Internal Revenue Service concerning reconfiguration of ownership. Accordingly, this paragraph has been redesignated and clarified as to what prior work would be considered part of the rehabilitation for which an owner is seeking current tax benefits.

Paragraph 67.6(b)(4): Several comments, both positive and negative, were received concerning the criteria for approving demolition as part of a certified rehabilitation. Although demolition is not generally encouraged, the Department believes that guidance in this area for both applicants and reviewers is important inasmuch as the law itself does not prohibit demolition as part of a certified rehabilitation; accordingly, although the criteria regarding demolition have been modified, this paragraph has been retained and redesignated paragraph 67.6(b)(5) in the final rule.

Paragraph 67.6(b)(7): Three comments suggested that this paragraph be clarified to specify how owners should identify 60-month phased projects on Historic Preservation Certification Applications and when certifications of rehabilitations would be issued. Accordingly, this paragraph has been revised to describe the use of NPS application forms. It was also revised to state that final certifications would not be issued by the Secretary until all phases of the rehabilitation were complete and that the taxpayer is directed to comply with Internal Revenue Service procedures (26 CFR part 1) regarding late certifications. This paragraph has been redesignated paragraph 67.6(b)(8) in the final rule.

Section 67.7 Standards for Rehabilitation.

Nineteen comments were received in response to the proposed revisions of the Secretary of the Interior's Standards for Rehabilitation. Many of the comments were positive about the retention of the philosophical principles of the Standards for Rehabilitation and the proposed modifications in wording. At the same time, there were a number of concerns about specific changes to individual Standards. Generally those concerns focused on five broad issues: the changes reduce the flexibility of the Standards; the changes overemphasize visual characteristics of buildings; the changes restrict protection given archeological resources; the quality of craftsmanship and materials is not sufficiently emphasized; and the revisions to the Standards did not receive broad distribution and comment from all interested parties. Comments on individual Standards and the Secretary's position are discussed under the relevant Standard.

With respect to the criticism that the revised Standards did not receive sufficient comment from interested preservation professionals and effected parties, it is the Department's position that broad input was solicited from such organizations as the American Institute of Architects, the National Trust for Historic Preservation, and the National Conference of State Historic Preservation Officers. In August 1986 the National Park Service convened a symposium of a wide variety of professionals representing Federal, State, local and private organizations and groups for the purpose of examining the Secretary of the Interior's Standards for Rehabilitation to determine whether they had remained valid principles of preservation and whether the language of the Standards should be revised. A summary of the symposium proceedings, including suggested modifications to the Standards, was circulated to all interested parties in late 1986. As a result of that process, the Standards for Rehabilitation were modified and published for public comment on May 23, 1988, in the **Federal Register** (53 FR 18292) as part of the proposed rulemaking, 36 CFR part 67. The Department believes that the National Park Service has sought extraordinary participation in the modification of the Standards for Rehabilitation and particularly given the relatively few comments received, believes that no further extension of the comment period for the Standards for Rehabilitation is warranted.

Paragraph 67.7(a): A number of comments observed that the modified Standards appeared to be less flexible than existing, with phrases like "wherever possible" deleted. Additionally, several comments proposed that historic landscapes be included as resources to which the Standards would apply. The Department believes that the modified wording of the Standards is no less flexible than the previous wording, and a new paragraph has been added to state that all the Standards shall be applied in a

reasonable manner. Although the Standards previously have been interpreted by the NPS as applying to historic landscape features, the paragraph now states explicitly that the Standards apply to the historic building's landscape features as well.

Paragraph 67.7(a)(1): Several comments objected to the apparent new emphasis on using a property for its historic purpose because of the elimination of the phrase "every reasonable effort" shall be made to find a compatible use. Accordingly, Standard 1 has been revised to state that the reuse of the property, whether its historic use or a new use, should result in minimal change to the historic qualities of the building.

Paragraph 67.7(a)(2): A number of comments objected to the elimination from Standard 2 of the word "distinguishing" in reference to the historic qualities of a building. The Department notes this objection and has reinstated the word. Accordingly, Standard 2 now states "Retain and preserve the distinguishing historic character of a property."

Paragraph 67.7(a)(3): Several comments stated that the revised Standard 3 was less flexible, overemphasized the visual characteristics of the historic property, and limited the available design for alterations to modern or abstract solutions in order to avoid creating a "false historical appearance." The Department does not believe that alterations which create an inaccurate sense of time, place, and use are appropriate rehabilitation treatments but agrees that the historic character of a property includes more than its visual attributes. Accordingly, Standard 3 has been revised to eliminate any visual emphasis by requiring that alterations not create a "false sense of historical development." The Department has also provided an example of what can create a false sense of historical development.

Paragraph 67.7(a)(4): One comment stated that the revised Standard 4 was too inflexible because it did not differentiate between "all changes" and "significant changes" in determining what was important evidence of the development of a historic property. Accordingly, Standard 4 has been revised to recognize that not all changes to a historic property are significant and that only significant changes must be retained and preserved in the rehabilitation process.

Paragraph 67.7(a)(5): A number of comments objected to the deletion of the word "distinctive" from the revised Standard 5. Accordingly, the word "distinctive" has been reinstated in the Standard.

Paragraph 67.7(a)(6): A number of comments stated that the revised Standard 6 was internally inconsistent because while it required repair of historic features, it also prescribed criteria for replacement. Replacement is acceptable in the context of Standard 6 only in the event of severe deterioration. The Department believes that the modifications in wording to this Standard eliminate perceived inconsistencies and make clear that only distinctive deteriorated features require matching replacements.

Paragraph 67.7(a)(7): One comment on the revised Standard 7 stated that the Standard was too specific in its prohibitions while another pointed out that surface cleaning is not always an appropriate treatment. Another comment requested that the Standard be revised to recognize that cleaning of buildings may harm historic landscape features and plants. The Department agrees that cleaning a historic surface is not always appropriate and believes that if it is determined appropriate, it must be undertaken using the gentlest means possible. Standard 6 has been revised accordingly.

Paragraph 67.7(a)(8): Eleven comments were received on the revised Standard 8, and nearly all objected strongly to the revised Standard 8. Several comments stated that the Standard should afford protection to all archeological resources, whether integral to the historic significance of the property or not and regardless of whether those archeological resources were known prior to the initiation of a rehabilitation project. Additionally, several comments observed that the apparent lack of protection for all archeological resources in the revised Standard 8 could warrant a determination as to whether NPS certifications of rehabilitation should be considered an undertaking for purposes of review under Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470f).

Changes to paragraph 67.7(a)(8) were made as a result of the comments with respect to consideration of archeological resources affected by rehabilitation projects. However, rehabilitation certification decisions made pursuant to sec. 48(g) of the Internal Revenue Code are not considered by the Department to be Federal undertakings within the meaning of section 106 of the National Historic Preservation Act. It is also noted that, in any event, the procedures for issuance of rehabilitation certifications in fact incorporate the fundamental protection afforded historic properties by Section 106 (consideration of historic values when making Federal decisions) and incorporate the SHPO consultation objectives of section 106 regulations, 36 CFR part 900. Further, 36 CFR 800.9(c) states that Federal undertakings concerning the rehabilitation of buildings do not have adverse effects if the rehabilitation meets the Secretary of the Interior's Standards. In these circumstances, Advisory Council on Historic Preservation comment on the undertaking is not required. 36 CFR 800.5(d).

Paragraph 67.7(a)(9): Many of the comments on the revised Standard 9 were concerned about an apparent perceived bias towards "modern" design on the part of the NPS and the requirement that a visual distinction be made between old and new. Several comments recommended that the Standard require that the quality of workmanship in new construction be commensurate with the quality of workmanship of the historic structure. The Department has modified Standard 9 to make clear that its sole concern vis-a-vis new construction rests with the protection of the historic structure's materials and integrity, not the style of the new addition. The revised Standard 9 makes no reference to particular styles or designs, and earlier references to the materials and color of new additions have been deleted.

Paragraph 67.7(b): One comment suggested that the prohibition against exterior additions that "duplicate the form, material, style, and detailing of the structure" be eliminated because it restricts available and feasible design solutions. In response to this comment, the word "style" has been removed in the final rule. The language of this paragraph now specifies that a denial of certification will be issued only in those cases where a new addition duplicating the form, material, and detailing of the historic structure clearly compromises the integrity of the historic resource. This language permits a range of design solutions, and the Department does not believe that further change is warranted. In addition, in response to several comments this paragraph has been revised to state that every effort should be made to ensure the compatibility of new materials and workmanship with the old.

Section 67.8 Certifications of statutes.

Paragraph 67.8(a): One comment suggested specifying what properties were excluded from review by State or local review boards or commissions.

Accordingly, statutory exemptions have been added.

Section 67.11 Fees for processing rehabilitation certification requests.

Several comments opposed the continued imposition of fees for processing applications for certification of rehabilitation. It is the position of the Department that a 20 percent investment tax credit is a very specific benefit accruing to an individual that is well in excess of general benefits accruing to the public through historic preservation activities and that the imposition of review fees is appropriate. The Department's fee system meets the requirements established by Office of Management and Budget Circular No. A-25 that user charges be reasonable and limited to the total costs of providing the services for which the fee is charged.

Revisions

After consideration of comments and careful review, the National Park Service has made the following revisions to 36 CFR part 67. Editorial and technical changes have also been made.

Paragraph 67.1(c): This paragraph was revised to state that the SHPO acts on behalf of the State and that the NPS is not responsible for any actions, errors or omissions of the SHPO.

Section 67.2: The definition of "certified historic structure" has been clarified to state that the NPS decision on listing a property in the National Register of Historic Places does not limit the scope of review of a rehabilitation project for tax certification purposes and that such review will consider the entire historic resource as it existed prior to rehabilitation and any related new construction.

Section 67.2: The definition of "National Register of Historic Places" has been revised to incorporate relevant portions of the definition of "National Register Program" which has been deleted.

Section 67.2: A definition of "Property" has been added.

Paragraph 67.3(b)(1): This paragraph has been revised to state that normally two copies of the application and supplementary documentation are required: one for the SHPO and the other to be forwarded to the NPS regional office.

Paragraph 67.3(b)(5): This paragraph has been revised to state that in the event of a discrepancy between the application form and the supplementary documentation, an attempt will be made to resolve the discrepancy but that if the discrepancy is not resolved, the application form shall take precedence over any descriptions in the supplementary material.

Paragraph 67.3(b)(7): This paragraph has been revised to state that although an owner may submit a part 1 application prior to, or with, the part 2, the part 2 application will not be processed until an adequately documented part 1 is on file and acted upon unless the property is already as certified historic structure.

Section 67.4: Certification of significance. This section has been amended by redesignating paragraphs (b)(1), (d), (e), (f), (g), and (h) in existing regulation and by adding new paragraphs (d), (e), and (k). Specific revisions to individual paragraphs are discussed below.

Paragraph 67.4(d): This new paragraph requires owners of properties individually listed in the National Register that contain more than one building to submit a single part 1 describing all buildings within the listing to permit a determination as to which of the buildings within the listing contribute to the historic significance of the property. This paragraph becomes effective for all new applications received by the SHPO (and the NPS regional office in the case of nonparticipating States only) upon the effective date of the regulation.

Paragraph 67.4(e): This paragraph (formerly 67.4(b)(3)) has been revised to state that properties located within a registered historic district which contain more than one building where the buildings are judged by the Secretary to have been functionally related historically will be treated as a single certified historic structure when they are being rehabilitated as part of an overall project. Such properties will be evaluated to determine whether the component buildings contribute to the historic significance of the property and whether the property contributes to the historic significance of the historic district by application of the Secretary of the Interior's Standards for Evaluating Significance within Registered Historic Districts set forth at § 67.5.

Paragraph 67.4(f): A technical correction has been made to this paragraph (formerly 67.4(d)) to clarify that, with respect to all categories of preliminary determinations of significance, preliminary determinations of significance "become" final as of the date of listing of the property or the historic district or the amendment of an existing registered historic district in the National Register and that no separate certification of significance will be issued by the NPS regional office.

Paragraph 67.4(h): This paragraph (formerly 67.4(f)) has been revised to be consistent with the requirements of 36 CFR part 60 regarding moving buildings that are individually listed in the National Register and to clarify the requirements for documentation which must be submitted in connection with moving a certified historic structure.

Paragraph 67.4(k): This paragraph has been added and requires owners to report to the Secretary through the SHPO any substantial damage, alteration, or changes to a certified historic structure that occurs after issuance of a certification of significance and prior to certification of rehabilitation. This paragraph also prescribes an owner's right of appeal under § 67.10 and has been made consistent with the procedures in 36 CFR part 60 regarding removal of a property that has lost integrity from the National Register. A cross-reference to § 67.6(f) regarding damage, alteration, or changes caused by unacceptable rehabilitation work has been added.

Paragraph 67.5(b): This paragraph has been revised to state that guidance on preparing a structural engineer's report to help substantiate physical deterioration and/or structural damage may be obtained from the appropriate SHPO or NPS regional office.

Paragraph 67.5(c): This paragraph has been revised to provide that for purposes of certifications of significance and nonsignificance under section 48(g) of the Internal Revenue Code, information about the significance of a particular property as generally contained in National Register documentation is not conclusive. Additional specific information may be required in a part 1 application in order for a determination of significance or nonsignificance to be made. This paragraph also provides that the Keeper of the National Register may amend the National Register documentation through the issuance of a supplementary record if warranted by the information contained in part 1.

Paragraph 67.5(e): This paragraph has been revised to state that determinations of significance and nonsignificance of buildings within registered historic districts where nonhistoric surface material obscures the facade will be made only after sufficient material has been removed to determine whether the underlying building contributes or does not contribute to the significance of the historic district. For purposes of the other credits under section 48(g) of the Internal Revenue Code, a building within a registered historic district with

an obscured facade will be presumed to contribute to the significance of the historic district and, therefore, be ineligible for those credits unless the owner receives a determination of nonsignificance under the provisions of this paragraph and paragraph 67.4(a).

Paragraph 67.6(a)(1): This paragraph has been revised to provide that photographs of the "site and environment" of the structure prior to rehabilitation must be submitted; to give examples of supplementary documentation required; and to require the submission of plans for "attached, adjacent, or related new construction." A sentence was added to clarify that a denial of certification of rehabilitation may be issued in the event the owner does not provide sufficient documentation to permit review and evaluation of the project and that such a denial may be appealed under § 67.10. A provision was added to explain that because the circumstances of each rehabilitation project are unique, owners should not rely on certifications that may have been granted to other rehabilitations.

Paragraph 67.6(a)(2): This paragraph was revised to specify that owners must submit a Request for Certification of Completed Work (NPS form 10–168c) to obtain a designation of a completed project as a certified rehabilitation and must provide the social security or taxpayer identification number(s) of all owners.

Paragraph 67.6(b): This paragraph has been revised by redesignating paragraphs (b)(2), (b)(3), (b)(4), and (b)(5) and by adding new paragraphs (b)(2), (b)(5), and (b)(8). Specific revisions to individual paragraphs are described below.

Paragraph 67.6(b)(1): This paragraph has been revised to state that generally owners will not be held responsible for prior rehabilitation work not part of the current project for which certification is sought.

Paragraph 67.6(b)(2): This paragraph was formerly incorporated in paragraph 67.6(b)(1) and was redesignated for clarity.

Paragraph 67.6(b)(4): This paragraph (formerly 67.6(b)(3)) was revised to make it clear that for rehabilitation projects involving more than one certified historic structure where there was no historical functional relationship among the structures, certification decisions would be made separately on each structure regardless of how the structures were grouped for ownership purposes.

Paragraph 67.6(b)(5): This paragraph was added to provide the criteria for when demolition of a building as part of a rehabilitation project involving multiple buildings would result in denial and when demolition would be approved and the resulting project could be designated a certified rehabilitation.

Paragraph 67.6(b)(8): This paragraph was added to conform the requirements for certification of rehabilitations of 60-month phased projects under this part with the requirements of section 48(g) of the Internal Revenue Code and Internal Revenue Service regulations 26 CFR part 1. The paragraph provides instructions to applicants on the use of NPS forms and documentation requirements for 60-month phased projects. This paragraph also provides that separate certifications of portions of phased projects will not be issued.

Paragraph 67.7(a): The Standards for Rehabilitation have been revised for clarity and improved comprehension but subtantively remain the same in application. There will be no change in their application to particular rehabilitation projects. This is stated in the regulation.

Paragraph 67.7(b): This paragraph was added to state that the Standards for Rehabilitation shall be applied in a reasonable manner.

Paragraph 67.7(a)(1): This paragraph was revised to make clear that the reuse of a historic property, whether a continuing use or a new use, must result in minimal change to the historic qualities of the building and its site and environment.

Paragraph 67.7(a)(2): This paragraph was modified to clarify that the distinguishing historic qualities of a property should be retained and preserved.

Paragraph 67.7(a)(3): This paragraph was modified to clarify that changes to historic property that create a false sense of historical development shall not be undertaken.

Paragraph 67.7(a)(4): This paragraph was modified to clarify that changes over time are evidence of the development of a historic property and that significant changes shall be retained and preserved.

Paragraph 67.7(a)(5): This paragraph was modified to clarify that distinctive features, finishes and examples of craftsmanship shall be preserved.

Paragraph 67.7(a)(6): This paragraph was modified to clarify that deteriorated historic features and materials should be repaired unless the severity of deterioration warrants replacement of the feature. This paragraph clarifies that modern materials may be used to replace deteriorated distinctive historic features or materials if they match in design, color, texture, and other visual qualities.

Paragraph 67.7(a)(7): This paragraph was modified to provide that cleaning methods that cause damage to any historic materials not just building materials shall not be used and to clarify that surface cleaning of structures is not always appropriate.

Paragraph 67.7(a)(8): This paragraph was modified to provide that mitigation measures shall be undertaken when significant archeological resources must be disturbed by a rehabilitation project.

Paragraph 67.7(a)(9): This paragraph was modified to provide that new additions, alterations or related new construction shall not destroy historic materials, features or spaces and that new work shall be differentiated from old to protect the historic integrity of the property.

Paragraph 67.7(a)(10): This paragraph was modified to clarify that the future removal of new additions and adjacent or related new contruction should leave the integrity of the historic property and its environment unimpaired.

Paragraph 67.7(b): This paragraph was revised by the addition of improper insulation techniques to the list of improper treatments that could result in denial of certification of rehabilitation and to delete any reference to the "style" of a new exterior addition.

Paragraph 67.7(c): This paragraph was revised to conform to the new requirements of section 48(g) of the Internal Revenue Code of 1986 that exempt certified historic structures from meeting the physical test for retention of exterior walls and internal structural framework specified therein for other rehabilitations. The paragraph states that although there is no longer a physical test for retention of walls and structural framework for a certified historic structure in the Internal Revenue Code, the continuing requirement for certification of a rehabilitation in the Code still requires retention of distinguishing historic materials of external and internal walls and structural systems and a determination under this part that a rehabilitation meets the Secretary of the Interior's Standards for Rehabilitation.

Paragraph 67.7(e): This paragraph was added to provide that determinations as to the qualities of a structure and its site and environment are made taking into account all available information, not limited to information contained in the National Register.

Paragraph 68.8(a): This paragraph was revised to clarify that State or local review commissions and boards do not have jurisdiction to review alterations to properties owned by any governmental

entity which are exempt from such review by law.

Paragraph 67.10(a): Technical corrections were made to this paragraph. In addition, the paragraph was revised to provide that all information which an appellant wished the Chief Appeals Officer to consider must be submitted in writing irrespective of whether a meeting to discuss the appeal is scheduled. The paragraph was also revised to provide that the written decision of the Chief Appeals Officer would be issued as "promptly as circumstances permit" instead of "within 30 days of receipt of an appeal if circumstances permit." A sentence was added to clarify that appeals under this part are not conducted as an adjudicative proceeding.

Paragraph 67.10(c): This paragraph was revised to provide that the Chief Appeals Officer may base a decision in whole or in part on factors not discussed in the decision appealed from.

Section 67.11. Expedited review system for qualified States. This section was removed.

Section 67.12. Fees for processing rehabilitation certification requests. Technical corrections have been made to this section and it has been redesignated § 67.11.

Additional Considerations

These regulations are needed in order to provide guidance to the public as well as to government employees responsible for the implementation of the historic preservation certification process pursuant to sections 48(g) and 170(h) of the Internal Revenue Code of 1986. Evaluation of the effectiveness of the regulations after issuance will be based upon comments received from offices within the Department of the Interior, the Department of the Treasury and the Internal Revenue Service, other government agencies, and the public.

Compliance With Other Laws

The Department of the Interior has determined that this document is not a major rule under E.O. 12291. These revisions do not result in an impact on the economy of $100 million or any of the other effects listed in the Executive Order. The Department certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The information collection requirements contained in the application and in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1024–0009.

Environmental Impact Statement

This rulemaking is developed under the authority of section 101(a)(1) of the National Historic Preservation Act of 1966, 16 U.S.C. 470a–1(a) (170 ed.), as amended; section 48(g) of the Internal Revenue Code of 1986 (90 Stat. 1519, as amended by 100 Stat. 2085) 26 U.S.C. 48(g) and section 170(h) of the Internal Revenue Code of 1986 (94 Stat. 3204) 26 U.S.C. 170(h). Such procedures have no potential for significant environmental impact and are categorically excluded from the requirement for compliance with the National Environmental Policy Act. Therefore, it is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(c)) is required.

Drafting Information

The originators of these procedures are H. Ward Jandl, Preservation Assistance Division; Carol D. Shull, Interagency Resources Division; and Lars A. Hanslin, Office of the Solicitor.

List of Subjects in 36 CFR Part 67

Administrative practice and procedures, Historic preservation, Income taxes.

Dated: January 2, 1990.

Constance B. Harriman,

Assistant Secretary for Fish and Wildlife and Parks.

In consideration of the foregoing comments, 36 CFR part 67 is revised to read as follows:

PART 67—HISTORIC PRESERVATION CERTIFICATIONS PURSUANT TO SEC. 48(g) AND SEC. 170(h) OF THE INTERNAL REVENUE CODE OF 1986

Sec.

Authority: Sec. 101(a)(1) of the National Historic Preservation Act of 1966, 16 U.S.C. 470a–1(a)(170 ed.), as amended; Sec. 48(g) of the Internal Revenue Code of 1986 (90 Stat. 1519, as amended by 100 Stat. 2085) 26 U.S.C. 48(g); and Sec. 170(h) of the Internal Revenue Code of 1986 (94 Stat. 3204) 26 U.S.C. 170(h).

§ 67.1 Sec. 48(g) and Sec. 170(h) of the Internal Revenue Code of 1986.

(a) Sec. 48(g) of the Internal Revenue Code of 1986, 90 Stat. 1519, as amended by 100 Stat. 2085, and Sec. 170(h) of the Internal Revenue Code of 1986, 94 Stat. 3204, require the Secretary to make certifications of historic district statutes and of State and local districts, certifications of significance, and certifications of rehabilitation in connection with certain tax incentives involving historic preservation. These certification responsibilities have been delegated to the National Park Service (NPS); the following five regional offices issue certifications for the States listed below them.

Alaska Regional Office, National Park Service, 2525 Gambell Street, Room 107, Anchorage, Alaska 99503:

Alaska

Mid-Atlantic Regional Office, National Park Service, U.S. Customs House, Second Floor, Second and Chestnut Streets, Philadelphia, Pennsylvania 19106:

Connecticut
Delaware
District of Columbia
Indiana
Maine
Maryland
Massachusetts
Michigan
New Hampshire
New Jersey
New York
Ohio
Pennsylvania
Rhode Island
Vermont
Virginia
West Virginia

Rocky Mountain Regional Office, National Park Service, 12795 West Alameda Parkway, P.O. Box 25287, Denver, Colorado 80225:

Colorado
Illinois
Iowa
Kansas
Minnesota
Missouri
Montana
Nebraska
New Mexico
North Dakota
Oklahoma
South Dakota
Texas
Utah

Wisconsin
Wyoming

Southeast Regional Office, National Park Service, 75 Spring Street SW, Atlanta, Georgia 30303:

Alabama
Arkansas
Florida
Georgia
Kentucky
Louisiana
Mississippi
North Carolina
Puerto Rico
South Carolina
Tennessee
Virgin Islands

Western Regional Office, National Park Service, 450 Golden Gate Avenue, P.O. Box 36063, San Francisco, California 94102:

Arizona
California
Hawaii
Idaho
Nevada
Oregon
Washington

(b) The Washington office of the NPS establishes program direction and considers appeals of certification denials. The procedures for obtaining certifications are set forth below. It is the responsibility of owners wishing certifications to provide sufficient documentation to the Secretary to make certification decisions. These procedures, upon their effective date, are applicable to future and pending certification requests, except as otherwise provided herein.

(c) States receiving Historic Preservation Fund grants from the Department participate in the review of requests for certification, through recommendations to the Secretary by the State Historic Preservation Officer (SHPO). The SHPO acts on behalf of the State in this capacity and, therefore, the NPS is not responsible for any actions, errors or omissions of the SHPO.

(1) Requests for certifications and approvals of proposed rehabilitation work are sent by an owner first to the appropriate SHPO for review. State comments are recorded on National Park Service Review Sheets (NPS Forms 10–168 (d) and (e)) and are carefully considered by the Secretary before a certification decision is made. Recommendations of States with approved State programs are generally followed, but by law, all certification decisions are made by the Secretary, based upon professional review of the application and related information. The decision of the Secretary may differ from the recommendation of the SHPO.

(2) A State may choose not to participate in the review of certification requests. States not wishing to participate in the comment process should notify the Secretary in writing of this fact. Owners from such nonparticipating States may request certifications by sending their applications directly to the appropriate NPS regional office listed above. In all other situations, certification requests are sent first to the appropriate SHPO.

(d) The Internal Revenue Service is responsible for all procedures, legal determinations, and rules and regulations concerning the tax consequences of the historic preservation provisions described in this part. Any certification made by the Secretary pursuant to this part shall not be considered as binding upon the Internal Revenue Service or the Secretary of the Treasury with respect to tax consequences under the Internal Revenue Code. For example, certifications made by the Secretary do not constitute determinations that a structure is of the type subject to the allowance for depreciation under section 167 of the Code.

§ 67.2 Definitions.

As used in these regulations:

Certified Historic Structure means a building (and its structural components) which is of a character subject to the allowance for depreciation provided in section 167 of the Internal Revenue Code of 1986 which is either:

(a) Individually listed in the National Register; or

(b) Located in a registered historic district and certified by the Secretary as being of historic significance to the district.

Portions of larger buildings, such as single condominium apartment units, are no independently considered certified historic structures. Rowhouses, even with abutting or party walls, are considered as separate buildings. For purposes of the certification decisions set forth in this part, a certified historic structure encompasses the historic building and its site, landscape features, and environment, generally referred to herein as a "property" as defined below. The NPS decision on listing a property in the National Register of Historic Places, including boundary determinations, does not limit the scope of review of the rehabilitation project for tax certification purposes. Such review will include the entire historic property as it existed prior to rehabilitation and any related new construction. For purposes of the charitable contribution provisions only, a certified historic structure need not be depreciable to qualify; may be a structure other than a building; and may also be a remnant of a building such as a facade, if that is all that remains. For purposes of the other rehabilitation tax credits under section 48(g) of the Internal Revenue Code, any property located in a registered historic district is considered a certified historic structure so that other rehabilitation tax credits are not available; exemption from this provision can generally occur only if the Secretary has determined, prior to the rehabilitation of the property, that it is not of historic significance to the district.

Certified Rehabilitation means any rehabilitation of a certified historic structure which the Secretary has certified to the Secretary of the Treasury as being consistent with the historic character of the certified historic structure and, where applicable, with the district in which such structure is located.

Duly Authorized Representative means a State or locality's Chief Elected Official or his or her representative who is authorized to apply for certification of State/local statutes and historic districts.

Historic District means a geographically definable area, urban or rural, that possesses a significant concentration, linkage or continuity of sites, buildings, structures or objects united historically or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically during the period of significance but linked by association or function.

Inspection means a visit by an authorized representative of the Secretary or a SHPO to a certified historic structure for the purposes of reviewing and evaluating the significance of the structure and the ongoing or completed rehabilitation work.

National Register of Historic Places means the National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture that the Secretary is authorized to expand and maintain pursuant to section 101(a)(1) of the National Historic Preservation Act of 1966, as amended. The procedures of the National Register appear in 36 CFR part 60 *et seq.*

Owner means a person, partnership, corporation, or public agency holding a fee-simple interest in a property or any other person or entity recognized by the Internal Revenue Code for purposes of the applicable tax benefits.

Property means a building and its site and landscape features.

Registered Historic District means any district listed in the National Register or any district which is:

(a) Designated under a State or local statute which has been certified by the Secretary as containing criteria which will substantially achieve the purpose of preserving and rehabilitating buildings of significance to the district, and

(b) Certified by the Secretary as meeting substantially all of the requirements for the listing of districts in the National Register.

Rehabilitation means the process of returning a building or buildings to a state of utility, through repair or alteration, which makes possible an efficient use while preserving those portions and features of the building and its site and environment which are significant to its historic, architectural, and cultural values as determined by the Secretary.

Secretary means the Secretary of the Interior or the designee authorized to carry out his responsibilities.

Standards for Rehabilitation means the Secretary's Standards for Rehabilitation set forth in section 67.7 hereof.

State Historic Preservation Officer means the official within each State designated by the Governor or a State statute to act as liaison for purposes of administering historic preservation programs within that State.

State or Local Statute means a law of a State or local government designating, or providing a method for the designation of, a historic district or districts.

§ 67.3 Introduction to certifications of significance and rehabilitation and information collection.

(a) Who may apply:

(1) Ordinarily, only the fee simple owner of the property in question may apply for the certifications described in §§ 67.4 and 67.6 hereof. If an application for an evaluation of significance or rehabilitation project is made by someone other than the fee simple owner, however, the application must be accompanied by a written statement from the fee simple owner indicating that he or she is aware of the application and has no objection to the request for certification.

(2) Upon request of a SHPO the Secretary may determine whether or not a particular property located within a registered historic district qualifies as a certified historic structure. The Secretary shall do so, however, only after notifying the fee simple owner of record of the request, informing such owner of the possible tax consequences of such a decision, and permitting the property owner a 30-day time period to submit written comments to the Secretary prior to decision. Such time period for comment may be waived by the fee simple owner.

(3) The Secretary may undertake the certifications described in §§ 67.4 and 67.6 on his own initiative after notifying the fee simple owner and the SHPO and allowing a comment period as specified in § 67.3(a)(2).

(4) Owners of properties which appear to meet National Register criteria but are yet listed in the National Register or which are located within potential historic districts may request preliminary determinations from the Secretary as to whether such properties may qualify as certified historic structures when and if the properties or the potential historic districts in which they are located are listed in the National Register. Preliminary determinations may also be requested for properties outside the period or area of significance of registered historic districts as specified in § 67.5(c). Procedures for obtaining these determinations shall be the same as those described in § 67.4. Such determinations are preliminary only and are not binding on the Secretary. Preliminary determinations of significance will become final as of the date of the listing of the individual property or district in the National Register. For properties outside the period or area of significance of a registered historic district, preliminary determinations of significance will become final, except as provided below, when the district documentation on file with the NPS is formally amended. If during review of a request for certification of rehabilitation, it is determined that the property does not contribute to the significance of the district because of changes which occurred after the preliminary determination of significance was made, certified historic structure designation will be denied.

(5) Owners of properties not yet designated certified historic structures may obtain determinations from the Secretary on whether or not rehabilitation proposals meet the Secretary's Standards for Rehabilitation. Such determinations will be made only when the owner has requested a preliminary determination of the significance of the property as described in paragraph (a)(4) of this section and such request for determination has been acted upon by the NPS. Final certifications of rehabilitation will be issued only to owners of certified historic structures. Procedures for obtaining these determinations shall be the same as those described in sec. 67.6.

(b) How to apply:

(1) Requests for certifications of historic significance and of rehabilitation shall be made on Historic Preservation Certification Applications (NPS Form No. 10–168). Normally, two copies of the application are required; one to be retained by the SHPO and the other to be forwarded to the NPS. The information collection requirements contained in the application and in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1024–0009. Part 1 of the application shall be used in requesting a certification of historic significance or nonsignificance and preliminary determinations, while part 2 of the application shall be used in requesting an evaluation of a proposed rehabilitation project or, in conjunction with a Request for Certification of Completed Work, a certification of a completed rehabilitation project. Information contained in the application is required to obtain a benefit. Public reporting burden for this form is estimated to average 2.5 hours per response including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the form. Direct comments regarding this burden estimate or any aspect of this form may be made to the Chief, Administrative Services Division, National Park Service, P.O. Box 37127, Washington, DC 20013–7127 and to the Office of Management and Budget, Paperwork Reduction Project Number 1024–0009, Washington, DC 20503.

(2) Application forms are available from NPS regional offices or the SHPOs.

(3) Requests for certifications, preliminary determinations, and approvals of proposed rehabilitation projects shall be sent to the SHPO in participating States. Requests in nonparticipating States shall be sent directly to the appropriate NPS regional office.

(4) Generally reviews of certification requests are concluded within 60 days of receipt of a complete, adequately documented application, as defined § 67.4 and § 67.6 (30 days at the State level and 30 days at the Federal level). Where a State has chosen not to participate in the review process, review by the NPS generally is concluded within 60 days of receipt of a complete, adequately documented application. Where adequate documentation is not provided, the owner will be notified of the additional information needed to

undertake or complete review. The time periods in this part are based on the receipt of a complete application; they will be adhered to as closely as possible and are defined as calendar days. They are not, however, considered to be mandatory, and the failure to complete review within the designated periods does not waive or alter any certification requirement.

(5) Approval of applications and amendments to applications is conveyed only in writing by duly authorized officials of the NPS acting on behalf of the Secretary. Decisions with respect to certifications are made on the basis of the descriptions contained in the application form and other available information. In the event of any discrepancy between the application form and other, supplementary material submitted with it (such as architectural plans, drawings, specifications, etc.), the applicant shall be requested to resolve the discrepancy in writing. In the event the discrepancy is not resolved, the description in the application form shall take precedence. Falsification of factual representations in the application is subject to criminal sanctions of up to $10,000 in fines or imprisonment for up to five years pursuant to 18 U.S.C. 1001.

(6) It is the owner's responsibility to notify the Secretary if application reviews are not completed within the time periods specified above. The Secretary in turn will consult with the appropriate office to ensure that the review is completed in as timely manner as possible in the circumstances.

(7) Although certifications of significance and rehabilitation are discussed separately below, owners must submit Part 1 of the Historic Preservation Certification Application prior to, or with, part 2. Part 2 of the application will not be processed until an adequately documented part 1 is on file and acted upon unless the property is already a certified historic structure. Reviews of rehabilitation projects will also not be undertaken if the owner has objected to the listing of the property in the National Register.

§ 67.4 Certifications of historic significance.

(a) Requests for certifications of historic significance should be made by the owner to determine—

(1) That a property located within a registered historic district is of historic significance to such district; or

(2) That a property located within a registered historic district is not of historic significance to such district; or

(3) That a property not yet on the National Register appears to meet National Register criteria; or

(4) That a property located within a potential historic district appears to contribute to the significance of such district.

(b) To determine whether or not a property is individually listed or is part of a district in the National Register, the owner may consult the listing of National Register properties in the **Federal Register** (found in most large libraries), or contact the appropriate SHPO for current information.

(c) If a property is located within the boundaries of a registered historic district and the owner wishes the Secretary to certify whether the property contributes or does not contribute to the historic significance of the district or if the owner is requesting a preliminary determination of significance in accordance with § 67.3(a)(4), the owner must complete part 1 of the Historic Preservation Certification Application according to instructions accompanying the application. Such documentation includes but is not limited to:

(1) Name and mailing address of owner;

(2) Name and address of property;

(3) Name of historic district;

(4) Current photographs of property; photographs of the building and its site and landscape features prior to alteration if rehabilitation has been completed; photograph(s) showing the property along with adjacent properties and structures on the street; and photographs of interior features and spaces adequate to document significance;

(5) Brief description of appearance including alterations, distinctive features and spaces, and date(s) of construction;

(6) Brief statement of significance summarizing how the property does or does not reflect the values that give the district its distinctive historical and visual character, and explaining any significance attached to the property itself (i.e., unusual building techniques, important event that took place there, etc.).

(7) Sketch map clearly delineating property's location within the district; and

(8) Signature of fee simple owner requesting or concurring in a request for evaluation.

(d) If a property is individually listed in the National Register, it is generally considered a certified historic structure and no further certification is required. More specific considerations in this regard are as follows:

(1) If the property is individually listed in the National Register and the owner believes it has lost the characteristics which caused it to be nominated and therefore wishes it delisted, the owner should refer to the delisting procedures outlined in 36 CFR part 60.

(2) Some properties individually listed in the National Register include more than one building. In such cases, the owner must submit a single part 1 application, as described in paragraph (c) of this section, which includes descriptions of all the buildings within the listing. The Secretary will utilize the Standards for Evaluating Significance within Registered Historic Districts (§ 67.5) for the purpose of determining which of the buildings included within the listing are of historic significance to the property. The requirements of this paragraph are applicable to certification requests received by the SHPOs (and the NPS regional offices in the case of nonparticipating States only) upon the effective date of these regulations.

(e) Properties containing more than one building where the buildings are judged by the Secretary to have been functionally related historically to serve an overall purpose, such as a mill complex or a residence and carriage house, will be treated as a single certified historic structure, whether the property is individually listed in the National Register or is located within a registered historic district, when rehabilitated as part of an overall project. Buildings that are functionally related historically are those which have functioned together to serve an overall purpose during the property's period of significance. In the case of a property within a registered historic district which contains more than one building where the buildings are judged to be functionally related historically, an evaluation will be made to determine whether the component buildings contribute to the historic significance of the property and whether the property contributes to the significance of the historic district as in § 67.4(i). For questions concerning demolition of separate structures as part of an overall rehabilitation project, see § 67.6.

(f) Applications for preliminary determinations for individual listing must show how the property individually meets the National Register Criteria for Evaluation. An application for a property located in a potential historic district must document how the district meets the criteria and how the property contributes to the significance of that district. An application for a preliminary determination for a property in a registered historic district which is outside the period or area of significance in the district documentation on file with the NPS

must document and justify the expanded significance of the district and how the property contributes to the significance of the district or document the individual significance of the property. Applications must contain substantially the same level of documentation as National Register nominations, as specified in 36 CFR part 60 and National Register Bulletin 16, "Guidelines for Completing National Register of Historic Places Forms" (available from SHPOs and NPS regional offices). Applications must also include written assurance from the SHPO that the district nomination is being revised to expand its significance or, for certified districts, written assurance from the duly authorized representative that the district documentation is being revised to expand its significance, or that the SHPO is planning to nominate the property or the district. Owners should understand that confirmation of intent to nominate by a SHPO does not constitute listing in the National Register, nor does it constitute a certification of significance as required by law for Federal tax incentives. Owners should further understand that they are proceeding at their own risk. If the property or district is not listed in the National Register for procedural, substantive or other reasons; if the district documentation is not formally amended; or if the significance of the property has been lost as a result of alterations or damage, these preliminary determinations of significance will not become final. The SHPO must nominate the property or the district or the SHPO for National Register districts and the duly authorized representative in the case of certified districts must submit documentation and have it approved by the NPS to amend the National Register nomination or certified district or the property or district must be listed before the preliminary certification of significance can become final.

(g) For purposes of the other rehabilitation tax credits under sec. 48(g) of the Internal Revenue Code, properties within registered historic districts are presumed to contribute to the significance of such districts unless certified as nonsignificant by the Secretary. Owners of nonhistoric properties within registered historic districts, therefore, must obtain a certification of nonsignificance in order to qualify for those investment tax credits. If an owner begins or completes a substantial alteration (within the meaning of sec. 167(n) of the Internal Revenue Code) of a property in a registered historic district without knowledge of requirements for certification of nonsignificance, he or she may request certification that the property was not of historic significance to the district prior to substantial alteration in the same manner as stated in sec. 67.4(c). The owner should be aware, however, of the requirements under sec. 48(g) of the Internal Revenue Code that the taxpayer must certify to the Secretary of the Treasury that, at the beginning of such substantial alteration, he or she in good faith was not aware of the certification requirement by the Secretary of the Interior.

(h) The Secretary discourages the moving of historic buildings from their original sites. However, if a building is to be moved as part of a rehabilitation for which certification is sought, the owner must follow different procedures depending on whether the building is individually listed in the National Register or is within a registered historic district. When a building is moved, every effort should be made to re-establish its historic orientation, immediate setting, and general environment. Moving a building may result in removal of the property from the National Register or, for buildings within a registered historic district, denial or revocation of a certification of significance; consequently, a moved building may, in certain circumstances, be ineligible for rehabilitation certification.

(1) Documentation must be submitted that demonstrates:

(i) The effect of the move on the building's integrity and appearance (any proposed demolition, proposed changes in foundations, etc.);

(ii) Photographs of the site and general environment of the proposed site;

(iii) Evidence that the proposed site does not possess historical significance that would be adversely affected by the moved building;

(iv) The effect of the move on the distinctive historical and visual character of the district, where applicable; and

(v) The method to be used for moving the building.

(2) For buildings individually listed in the National Register, the procedures contained in 36 CFR part 60 must be followed prior to the move, or the building will be removed from the National Register, will not be considered a certified historic structure, and will have to be renominated for listing. The owner may submit a part 1 application in order to receive a preliminary determination from the NPS of whether a move will cause the property to be removed from the National Register. However, preliminary approval of such a part 1 application does not satisfy the requirements of 36 CFR part 60. The SHPO must follow the remaining procedures in that regulation so that the NPS can determine that the moved building will remain listed in the National Register and retain its status as a certified historic structure.

(3) If an owner moves (or proposes to move) a building into a registered historic district or moves (or proposes to move) a building elsewhere within a registered historic district, a part 1 application containing the required information described in paragraph (h)(1) of this section must be submitted. The building to be moved will be evaluated to determine if it contributes to the historic significance of the district both before and after the move as in § 67.4(i).

(i) Properties within registered historic districts will be evaluated to determine if they contribute to the historic significance of the district by application of the Secretary's Standards for Evaluating Significance within Registered Historic Districts as set forth in § 67.5.

(j) Once the significance of a property located within a registered historic district or a potential historic district has been determined by the Secretary, written notification will be sent to the owner and the SHPO in the form of a certification of significance or nonsignificance.

(k) Owners shall report to the Secretary through the SHPO any substantial damage, alteration or changes to a property that occurs after issuance of a certification of significance and prior to a final certification of rehabilitation. The Secretary may withdraw a certification of significance, upon thirty days notice to the owner, if a property has been damaged, altered or changed effective as of the date of the occurrence. The property may also be removed from the National Register, in accordance with the procedures in 36 CFR part 60. A revocation of certification of significance pursuant to this part may be appealed under § 67.10. For damage, alteration or changes caused by unacceptable rehabilitation work, see § 67.6(f).

§ 67.5 Standards for Evaluating Significance within Registered Historic Districts.

(a) Properties located within registered historic districts are reviewed by the Secretary to determine if they contribute to the historic significance of the district by applying the following Standards for Evaluating Significance within Registered Historic Districts.

(1) A building contributing to the historic significance of a district is one which by location, design, setting, materials, workmanship, feeling and association adds to the district's sense of time and place and historical development.

(2) A building not contributing to the historic significance of a district is one which does not add to the district's sense of time and place and historical development; or one where the location, design, setting, materials, workmanship, feeling and association have been so altered or have so deteriorated that the overall integrity of the building has been irretrievably lost.

(3) Ordinarily buildings that have been built within the past 50 years shall not be considered to contribute to the significance of a district unless a strong justification concerning their historical or architectural merit is given or the historical attributes of the district are considered to be less than 50 years old.

(b) A condemnation order may be presented as evidence of physical deterioration of a building but will not of itself be considered sufficient evidence to warrant certification of nonsignificance for loss of integrity. In certain cases it may be necessary for the owner to submit a structural engineer's report to help substantiate physical deterioration and/or structural damage. Guidance on preparing a structural engineer's report is available from the appropriate SHPO or NPS regional office.

(c) Some properties listed in the National Register, primarily districts, are resources whose concentration or continuity possesses greater historical significance than many of their individual component buildings and structures. These usually are documented as a group rather than individually. Accordingly, this type of National Register documentation is not conclusive for the purposes of this part and must be supplemented with information on the significance of the specific property. Certifications of significance and nonsignificance will be made on the basis of the application documentation, existing National Register documentation, and other available information as needed. The Keeper may amend the National Register documentation by issuing a supplementary record if the application material warrants such an amendment. If a certification request is received for a property which is not yet listed on the National Register or which is outside a district's established period or area of significance, a preliminary determination of significance will be issued only if the request includes adequate documentation and if there is written assurance from the SHPO that the SHPO plans to nominate the property or district or that the district nomination in question is being revised to expand its significance or for certified districts, written assurance from the duly authorized representative that the district documentation is being revised to expand the significance. Certifications will become final when the property or district is listed or when the district documentation is officially amended unless the significance of the property has been lost as a result of alteration or damage. For procedures on amending listings to the National Register and additional information on the use of National Register documentation and the supplementary record which is contained in National Register Bulletin 19, "Policies and Procedures for Processing National Register Nominations," consult the appropriate SHPO or NPS regional office.

(d) Where rehabilitation credits are sought, certifications of significance will be made on the appearance and condition of the property before rehabilitation was begun.

(e) If a nonhistoric surface material obscures a facade, it may be necessary for the owner to remove a portion of the surface material prior to requesting certification so that a determination of significance or nonsignificance can be made. After the material has been removed, if the obscured facade has retained substantial historic integrity and the property otherwise contributes to the historic district, it will be determined to be a certified historic structure. However, if the obscuring material remains when a determination of nonsignificance is requested under § 67.4(a)(2), the property will be presumed to contribute to the historic significance of the district, if otherwise qualified, and, therefore, not eligible for the other tax credits under section 48(g) of the Internal Revenue Code.

(f) Additional guidance on certifications of historic significance is available from SHPOs and NPS regional offices.

§ 67.6 Certifications of rehabilitation.

(a) Owners who want rehabilitation projects for certified historic structures to be certified by the Secretary as being consistent with the historic character of the structure, and, where applicable, the district in which the structure is located, thus qualifying as a certified rehabilitation, shall comply with the procedures listed below. A fee, as described in § 67.11, for reviewing all proposed, ongoing, or completed rehabilitation work is charged by the Secretary. No certification decisions will be issued on any application until the appropriate remittance is received.

(1) To initiate review of a rehabilitation project for certification purposes, an owner must complete part 2 of the Historic Preservation Certification Application according to instructions accompanying the application. These instructions explain in detail the documentation required for certification of a rehabilitation project. The application may describe a proposed rehabilitation project, a project in progress, or a completed project. In all cases, documentation, including photographs adequate to document the appearance of the structure(s), both on the exterior and on the interior, and its site and environment prior to rehabilitation must accompany the application. The social security or taxpayer identification number(s) of all owners must be provided in the application. Other documentation, such as window surveys or cleaning specifications, may be required by reviewing officials to evaluate certain rehabilitation projects. Plans for any attached, adjacent, or related new construction must also accompany the application. Where necessary documentation is not provided, review and evaluation may not be completed and a denial of certification will be issued on the basis of lack of information. Owners are strongly encouraged to submit part 2 of the application prior to undertaking any rehabilitation work. Owners who undertake rehabilitation projects without prior approval from the Secretary do so strictly at their own risk. Because the circumstances of each rehabilitation project are unique to the particular certified historic structure involved, certifications that may have been granted to other rehabilitations are not specifically applicable and may not be relied on by owners as applicable to other projects.

(2) A project does not become a certified rehabilitation until it is completed and so designated by the NPS. A determination that the completed rehabilitation of a property not yet designated a certified historic structure meets the Secretary's Standards for Rehabilitation does not constitute a certification of rehabilitation. When requesting certification of a completed rehabilitation project, the owner shall submit a Request for Certification of Completed Work (NPS Form 10–168c) and provide the project completion date and a signed statement that the

completed rehabilitation project meets the Secretary's Standards for Rehabilitation and is consistent with the work described in part 2 of the Historic Preservation Certification Application. Also required in requesting certification of a completed rehabilitation project are costs attributed to the rehabilitation, photographs adequate to document the completed rehabilitation, and the social security or taxpayer identification number(s) of all owners.

(b) A rehabilitation project for certification purposes encompasses all work on the interior and exterior of the certified historic structure(s) and its site and environment, as determined by the Secretary, as well as related demolition, new construction or rehabilitation work which may affect the historic qualities, integrity or site, landscape features, and environment of the certified historic structure(s). More specific considerations in this regard are as follows:

(1) All elements of the rehabilitation project must meet the Secretary's ten Standards for Rehabilitation (§ 67.7); portions of the rehabilitation project not in conformance with the Standards may not be exempted. In general, an owner undertaking a rehabilitation project will not be held responsible for prior rehabilitation work not part of the current project, or rehabilitation work that was undertaken by previous owners or third parties.

(2) However, if the Secretary considers or has reason to consider that a project submitted for certification does not include the entire rehabilitation project subject to review hereunder, the Secretary may choose to deny a rehabilitation certification or to withhold a decision on such a certification until such time as the Internal Revenue Service, through a private letter ruling, has determined, pursuant to these regulations and applicable provisions of the Internal Revenue Code and income tax regulations, the proper scope of the rehabilitation project to be reviewed by the Secretary. Factors to be taken into account by the Secretary and the Internal Revenue Service in this regard include, but are not limited to, the facts and circumstance of each application and (i) whether previous demolition, construction or rehabilitation work irrespective of ownership or control at the time was in fact undertaken as part of the rehabilitation project for which certification is sought, and (ii) whether property conveyances, reconfigurations, ostensible ownership transfers or other transactions were transactions which purportedly limit the scope of a rehabilitation project for the purpose of review by the Secretary without substantially altering beneficial ownership or control of the property. The fact that a property may still qualify as a certified historic structure after having undergone inappropriate rehabilitation, construction or demolition work does not preclude the Secretary or the Internal Revenue Service from determining that such inappropriate work is part of the rehabilitation project to be reviewed by the Secretary.

(3) Conformance to the Standards will be determined on the basis of the application documentation and other available information by evaluating the property as it existed prior to the commencement of the rehabilitation project, regardless of when the property becomes or became a certified historic structure.

(4) For rehabilitation projects involving more than one certified historic structure where the structures are judged by the Secretary to have been functionally related historically to serve an overall purpose, such as a mill complex or a residence and carriage house, rehabilitation certification will be issued on the merits of the overall project rather than for each structure or individual component. For rehabilitation projects where there is no historic functional relationship among the structures, the certification decision will be made for each separate certified historic structure regardless of how they are grouped for ownership or development purposes.

(5) Demolition of a building as part of a rehabilitation project involving multiple buildings may result in denial of certification of the rehabilitation. In projects where there is no historic functional relationship among the structures being rehabilitated, related new construction which physically expands one certified historic structure undergoing rehabilitation and, therefore, directly causes the demolition of an adjacent structure will generally result in denial of certification of the rehabilitation unless a determination has been made that the building to be demolished is not a certified historic structure as in § 67.4(a). In rehabilitation projects where the structures have been determined to be functionally related historically, demolition of a component may be approved, in limited circumstances, when:

(i) The component is outside the period of significance of the property, or

(ii) The component is so deteriorated or altered that its integrity has been irretrievably lost; or

(iii) The component is a secondary one that generally lacks historic, engineering, or architectural significance or does not occupy a major portion of the site and persuasive evidence is present to show that retention of the component is not technically or economically feasible.

(6) In situations involving rehabilitation of a certified historic structure in a historic district, the Secretary will review the rehabilitation project first as it affects the certified historic structure and second as it affects the district and make a certification decision accordingly.

(7) In the event that an owner of a portion of a certified historic structure requests certification for a rehabilitation project related only to that portion, but there is or was a larger related rehabilitation project(s) occurring with respect to the certified historic structure, the Secretary's decision on the requested certification will be based on review of the overall rehabilitation project(s) for the certified historic structure.

(8) For rehabilitation projects which are to be completed in phases over the alternate 60-month period allowed in section 48(g) of the Internal Revenue Code, the initial part 2 application and supporting architectural plans and specifications should identify the project as a 60-month phased project and describe the number and order of the phases and the general scope of the overall rehabilitation project. If the initial part 2 application clearly identifies the project as a phased rehabilitation, the NPS will consider the project in all its phases as a single rehabilitation. If complete information on the rehabilitation work of the later phases is not described in the initial part 2 application, it may be submitted at a later date but must be clearly identified as a later phase of a 60-month phased project that was previously submitted for review. Owners are cautioned that work undertaken in a later phase of a 60-month phased project that does not meet the Standards for Rehabilitation, whether or not submitted for review, will result in a denial of certification of the entire rehabilitation with the tax consequences of such a denial to be determined by the Secretary of the Treasury. Separate certifications for portions of phased rehabilitation projects will not be issued. Rather the owner will be directed to comply with Internal Revenue Service regulations governing late certifications contained in 26 CFR 1.48-12.

(c) Upon receipt of the complete application describing the rehabilitation

project, the Secretary shall determine if the project is consistent with the Standards for Rehabilitation. If the project does not meet the Standards for Rehabilitation, the owner shall be advised of that fact in writing and, where possible, will be advised of necessary revisions to meet such Standards. For additional procedures regarding rehabilitation projects determined not to meet the Standards for Rehabilitation, see § 67.6(f).

(d) Once a proposed or ongoing project has been approved, substantive changes in the work as described in the application must be brought promptly to the attention of the Secretary by written statement through the SHPO to ensure continued conformance to the Standards; such changes should be made using a Historic Preservation Certification Application Continuation/Amendment Sheet (NPS Form 10–168b). The Secretary will notify the owner and the SHPO in writing whether the revised project continues to meet the Standards. Oral approvals of revisions are not authorized or valid.

(e) Completed projects may be inspected by an authorized representative of the Secretary to determine if the work meets the Standards for Rehabilitation. The Secretary reserves the right to make inspections at any time up to five years after completion of the rehabilitation and to revoke a certification, after giving the owner 30 days to comment on the matter, if it is determined that the rehabilitation project was not undertaken as represented by the owner in his or her application and supporting documentation, or the owner, upon obtaining certification, undertook further unapproved project work inconsistent with the Secretary's Standards for Rehabilitation. The tax consequences of a revocation of certification will be determined by the Secretary of the Treasury.

(f) If a proposed, ongoing, or completed rehabilitation project does not meet the Standards for Rehabilitation, an explanatory letter will be sent to the owner with a copy to the SHPO. A rehabilitated property not in conformance with the Standards for Rehabilitation and which is determined to have lost those qualities which caused it to be nominated to the National Register, will be removed from the National Register in accord with Department of the Interior regulations 36 CFR part 60. Similarly, if a property has lost those qualities which caused it to be designated a certified historic structure, it will be certified as noncontributing (see § 67.4 and § 67.5). In either case, the delisting or certification of nonsignificance is considered effective as of the date of issue and is not considered to be retroactive. In these situations, the Internal Revenue Service will be notified of the substantial alterations. The tax consequences of a denial of certification will be determined by the Secretary of the Treasury.

§ 67.7 Standards for Rehabilitation.

(a) The following Standards for Rehabilitation are the criteria used to determine if a rehabilitation project qualifies as a certified rehabilitation. The intent of the Standards is to assist the long-term preservation of a property's significance through the preservation of historic materials and features. The Standards pertain to historic buildings of all materials, construction types, sizes, and occupancy and encompass the exterior and the interior of historic buildings. The Standards also encompass related landscape features and the building's site and environment, as well as attached, adjacent, or related new construction. To be certified, a rehabilitation project must be determined by the Secretary to be consistent with the historic character of the structure(s) and, where applicable, the district in which it is located.

(b) The following Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. (The application of these Standards to rehabilitation projects is to be the same as under the previous version so that a project previously acceptable would continue to be acceptable under these Standards.)

(1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.

(2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.

(3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.

(4) Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.

(5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.

(6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

(7) Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.

(8) Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

(10) New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

(c) The quality of materials and craftsmanship used in a rehabilitation project must be commensurate with the quality of materials and craftsmanship of the historic building in question. Certain treatments, if improperly applied, or certain materials by their physical properties, may cause or accelerate physical deterioration of historic buildings. Inappropriate physical treatments include, but are not limited to: improper repointing techniques; improper exterior masonry cleaning methods; or improper introduction of insulation where damage to historic fabric would result. In almost all situations, use of these materials and treatments will result in denial of certification. Similarly, exterior additions that duplicate the form, material, and detailing of the structure to the extent that they compromise the historic character of the structure will result in denial of certification. For further information on appropriate and inappropriate rehabilitation treatments, owners are to consult the Guidelines for Rehabilitating Historic Buildings published by the NPS. "Preservation Briefs" and additional technical

information to help property owners formulate plans for the rehabilitation, preservation, and continued use of historic properties consistent with the intent of the Secretary's Standards for Rehabilitation are available from the SHPOs and NPS regional offices. Owners are responsible for procuring this material as part of property planning for a certified rehabilitation.

(d) In certain limited cases, it may be necessary to dismantle and rebuild portions of a certified historic structure to stabilize and repair weakened structural members and systems. In such cases, the Secretary will consider such extreme intervention as part of a certified rehabilitation if:

(1) The necessity for dismantling is justified in supporting documentation;

(2) Significant architectural features and overall design are retained; and

(3) Adequate historic materials are retained to maintain the architectural and historic integrity of the overall structure.

Section 48(g) of the Internal Revenue Code of 1986 exempts certified historic structures from meeting the physical test for retention of external walls and internal structural framework specified therein for other rehabilitated buildings. Nevertheless, owners are cautioned that the Standards for Rehabilitation require retention of distinguishing historic materials of external and internal walls as well as structural systems. In limited instances, rehabilitations involving removal of existing external walls, *i.e.*, external walls that detract from the historic character of the structure such as in the case of a nonsignificant later addition or walls that have lost their structural integrity due to deterioration, may be certified as meeting the Standards for Rehabilitation.

(e) Prior approval of a project by Federal, State, and local agencies and organizations does not ensure certification by the Secretary for Federal tax purposes. The Secretary's Standards for Rehabilitation take precedence over other regulations and codes in determining whether the rehabilitation project is consistent with the historic character of the property and, where applicable, the district in which it is located.

(f) The qualities of a property and its environment which qualify it as a certified historic structure are determined taking into account all available information, including information derived from the physical and architectural attributes of the building; such determinations are not limited to information contained in National Register or related documentation.

§ 67.8 Certifications of statutes.

(a) State or local statutes which will be certified by the Secretary. For the purpose of this regulation, a State or local statute is a law of the State or local government designating, or providing a method for the designation of, a historic district or districts. This includes any by-laws or ordinances that contain information necessary for the certification of the statute. A statute must contain criteria which will substantially achieve the purpose of preserving and rehabilitating properties of historic significance to the district. To be certified by the Secretary, the statute generally must provide for a duly designated review body, such as a review board or commission, with power to review proposed alterations to structures of historic significance within the boundaries of the district or districts designated under the statute except those owned by governmental entities which, by law, are not under the jurisdiction of the review body.

(b) When the certification of State statutes will have an impact on districts in specific localities, the Secretary encourages State governments to notify and consult with appropriate local officials prior to submitting a request for certification of the statute.

(c) State enabling legislation which authorizes local governments to designate, or provides local governments with a method to designate, a historic district or districts will not be certified unless accompanied by local statutes that implement the purposes of the State law. Adequate State statutes which designate specific historic districts and do not require specific implementing local statutes will be certified. If the State enabling legislation contains provisions which do not meet the intent of the law, local statutes designated under the authority of the enabling legislation will not be certified. When State enabling legislation exists, it must be certified before any local statutes enacted under its authority can be certified.

(d) Who may apply. Requests for certification of State or local statutes may be made only by the Chief Elected Official of the government which enacted the statute or his or her authorized representative. The applicant shall certify in writing that he or she is authorized by the appropriate State or local governing body to apply for certification.

(e) Statute certification process. Requests for certification of State or local statutes shall be made as follows:

(1) The request shall be made in writing from the duly authorized representative certifying that he or she is authorized to apply for certification. The request should include the name or title of a person to contact for further information and his or her address and telephone number. The authorized representative is responsible for providing historic district documentation for review and certification prior to the first certification of significance in a district unless another responsible person is indicated including his or her address and telephone number. The request shall also include a copy of the statute(s) for which certification is requested, including any by-laws or ordinances that contain information necessary for the certification of the statute. Local governments shall also submit a copy of the State enabling legislation, if any, authorizing the designation of historic districts.

(2) Requests shall be sent to the SHPO in participating States and directly to appropriate NPS regional offices in nonparticipating States.

(3) The Secretary shall review the statute(s) and assess whether the statute(s) and any by-laws or ordinances that contain information necessary for the certification of the statute contain criteria which will substantially achieve the purposes of preserving and rehabilitating properties of historic significance to the district(s) based upon the standards set out above in § 67.8(a). The SHPO shall be given a 30-day opportunity to comment upon the request. Comments received from the SHPO within this time period will be considered by the Secretary in the review process. If the statute(s) contain such provisions and if this and other provisions in the statute will substantially achieve the purpose of preserving and rehabilitating properties of historic significance to the district, the Secretary will certify the statute(s).

(4) The Secretary generally provides written notification within 30 days of receipt by the NPS to the duly authorized representative and to the SHPO when certification of the statute is given or denied. If certification is denied, the notification will provide an explanation of the reason(s) for such denial.

(f) Amendment or repeal of statute(s). State or local governments, as appropriate, must notify the Secretary in the event that certified statutes are repealed, whereupon the certification of the statute (and any districts designated thereunder) will be withdrawn by the Secretary. If a certified statute is amended, the duly authorized representative shall submit the amendment(s) to the Secretary, with a

copy to the SHPO, for review in accordance with the procedures outlined above. Written notification of the Secretary's decision as to whether the amended statute continues to meet these criteria will be sent to the duly authorized representative and the SHPO within 60 days of receipt.

(g) The Secretary may withdraw certification of a statute (and any districts designated thereunder) on his own initiative if it is repeal or amended to be inconsistent with certification requirements after providing the duly authorized representative and the SHPO 30 days in which to comment prior to the withdrawal of certification.

§ 67.9 Certifications of state or local historic districts.

(a) The particular State or local historic district must also be certified by the Secretary as substantially meeting National Register criteria, thereby qualifying it as a registered historic district, before the Secretary will process requests for certification of individual properties within a district or districts established under a certified statute.

(b) The provision described herein will not apply to properties within a State or local district until the district has been certified, even if the statute creating the district has been certified by the Secretary.

(c) The Secretary considers the duly authorized representative requesting certification of a statute to be the official responsible for submitting district documentation for certification. If another person is to assume responsibility for the district documentation, the letter requesting statute certification shall indicate that person's name, address, and telephone number. The Secretary considers the authorizing statement of the duly authorized representative to indicate that the jurisdiction involved wishes not only that the statute in question be certified but also wishes all historic districts designated by the statute to be certified unless otherwise indicated.

(d) Requests shall be sent to the SHPO in participating States and directly to the appropriate NPS regional office in nonparticipating States. The SHPO shall be given a 30-day opportunity to comment upon an adequately documented request. Comments received from the SHPO within this time period will be considered by the Secretary in the review process. The guidelines in National Register Bulletin 16, "Guidelines for Completing National Register of Historic Places Forms," provide information on how to document historic districts for the National Register. Each request should include the following documentation:

(1) A description of the general physical or historical qualities which make this a district; and explanation for the choice of boundaries for the district; descriptions of typical architectural styles and types of buildings in the district.

(2) A concise statement of why the district has significance, including an explanation of the areas and periods of significance, and why it meets National Register criteria for listing (see 36 CFR part 60); the relevant criteria should be identified (A, B, C, and D).

(3) A definition of what types of properties contribute and do not contribute to the significance of the district as well as an estimate of the percentage of properties within the district that do not contribute to its significance.

(4) A map showing all district properties with, if possible, identification of contributing and noncontributing properties; the map should clearly show the district's boundaries.

(5) Photographs of typical areas in the district as well as major types of contributing and noncontributing properties; all photographs should be keyed to the map.

(e) Districts designated by certified State or local statutes shall be evaluated using the National Register criteria (36 CFR part 60) within 30 days of the receipt of the required documentation by the Secretary. Written notification of the Secretary's decision will be sent to the duly authorized representative or to the person designated as responsible for the district documentation.

(f) Certification of statutes and districts does not constitute certification of significance of individual properties within the district or of rehabilitation projects by the Secretary.

(g) Districts certified by the Secretary as substantially meeting the requirements for listing will be determined eligible for listing in the National Register at the time time of certification and will be published as such in the **Federal Register**.

(h) Documentation on additional districts designated under a State or local statute the has been certified by the Secretary should be submitted to the Secretary for certification following the same procedures and including the same information outlined in the section above.

(i) State or local governments, as appropriate, shall notify the Secretary if a certified district designation is amended (including boundary changes) or repealed. If a certified district designation is amended, the duly authorized representative shall submit documentation describing the change(s) and, if the district has been increased in size, information on the new areas as outlined in § 67.9. A revised statement of significance for the district as a whole shall also be included to reflect any changes in overall significance as a result of the addition or deletion of areas. Review procedures shall follow those outlined in § 67.9 (d) and (e). The Secretary will withdraw certification of repealed or inappropriately amended certified district designations, thereby disqualifying them as registered historic districts.

(j) The Secretary may withdraw certification of a district on his own initiative if it ceases to meet the National Register Criteria for Evaluation after providing the duly authorized representative and the SHPO 30 days in which to comment prior to withdrawal of certification.

(k) The Secretary urges State and local review boards of commissions to become familiar with the Standards used by the Secretary of the Interior for certifying the rehabilitation of historic properties and to consider their adoption for local design review.

§ 67.10 Appeals.

(a) An appeal by the owner, or duly authorized representative as appropriate, may be made from any of the certifications or denials of certification made pursuant to this part or any decisions made pursuant to § 67.6(f). Such appeals must be in writing and received by the Chief Appeals Officer, Cultural Resources, National Park Service, U.S. Department of the Interior, P.O. Box 37127, Washington, DC 20013–7127, within 30 days of receipt of the decision which is the subject of the appeal. The appellant may request an opportunity for a meeting to discuss the appeal but all information the owner wishes the Chief Appeals Officer to consider must be submitted in writing. The SHPO will be notified that an appeal is pending. The Chief Appeals Officer will consider the record of the decision in question, any further written submissions by the owner, and other available information and shall provide the appellant a written decision as promptly as circumstances permit. Such appeals constitute an administrative review of the decision appealed from and are not conducted as an adjudicative proceeding.

(b) The denial of a preliminary determination of significance for an individual property may not be appealed by the owner because the denial itself

does not exhaust the administrative remedy that is available. The owner instead must seek recourse by undertaking the usual nomination process (36 CFR part 60). Similarly, the denial of preliminary certification for a rehabilitation for a rehabilitation project for a property that is not a certified historic structure may not be appealed. The owner must seek a final certification of significance as the next step, rather than appealing the denial of rehabilitation certification. Administrative reviews in these circumstances may be performed at the discretion of the Chief Appeals Officer. The decision to undertaken an administrative review will be made on a case-by-case basis, depending on particular facts and circumstances and the Chief Appeals Officer's schedule, the expected date for nomination, and the nature of the rehabilitation project (proposed, ongoing, or completed). Administrative reviews of rehabilitation projects will not be undertaken if the owner has objected to the listing of the property in the National Register.

(c) In considering such appeals or administrative reviews, the Chief Appeals Officer shall take in account alleged errors in professional judgment or alleged prejudicial procedural errors by NPS officials. The Chief Appeals Officer's decision may:

(1) Reverse the appealed decision;

(2) Affirm the appealed decision;

(3) Resubmit the matter to the appropriate Regional Director for further consideration; or

(4) Where appropriate, withhold a decision until issuance of a ruling from the Internal Revenue Service pursuant to § 67.6(b)(2).

The Chief Appeals Officer may base his decision in whole or part on matters or factors not discussed in the decision appealed from. The Chief Appeals Officer is authorized to issue the certifications discussed in this part only if he considers that the requested certification meets the applicable statutory standard upon application of the Standards set forth herein or he considers that prejudicial procedural error by a Federal official legally compels issuance of the requested certification.

(d) The decision of the Chief Appeals Officer shall be the final administrative decision on the appeal. No person shall be considered to have exhausted his or her administrative remedies with respect to the certifications or decisions described in this part until the Chief Appeals Officer has issued a final administrative decision pursuant to this section.

§ 67.11 Fees for processing rehabilitation certification requests.

(a) Fees are charged for reviewing rehabilitation certification requests in accordance with the schedule below.

(b) Payment shall not be made until requested by the NPS regional office according to instructions accompanying the Historic Preservation Certification Application. All checks shall be made payable to: *National Park Services.* A certification decision will not be issued on an application until the appropriate remittance is received. Fees are nonrefundable.

(c) The fee for review of proposed or ongoing rehabilitation projects for projects over $20,000 is $250. The fees for review of completed rehabilitation projects are based on the dollar amount of the costs attributed solely to the rehabilitation of the certified historic structure as provided by the owner in the Historic Preservation Certification Application, Request for Certification of Completed Work (NPS Form 10–168c), as follows:

Fee	Size of rehabilitation
$500	$20,000 to $99,999
$800	$100,000 to $499,999
$1,500	$500,000 to $999,999
$2,500	$1,000,000 or more

If review of a proposed or ongoing rehabilitation project had been undertaken by the Secretary prior to submission of Request for Certification of Completed Work, the initial fee of $250 will be deducted from these fees. No fee will be charged for rehabilitations under $20,000.

(d) In general, each rehabilitation of a separate certified historic structure will be considered a separate project for purposes of computing the size of the fee.

(1) In the case of a rehabilitation project which includes more than one certified historic structure where the structures are judged by the Secretary to have been functionally related historically to serve an overall purpose, the fee for preliminary review is $250 and the fee for final review is computed on the basis of the total rehabilitation costs.

(2) In the case of multiple building projects where there is no historic functional relationship amont the structures and which are under the same ownership; are located in the same historic district; are adjacent or contiguous; are of the same architectural type (*e.g.*, rowhouses, loft buildings, commercial buildings); and are submitted by the owner for review at the same time, the fee for preliminary review is $250 per structure to a maximum of $2,500 and the fee for final review is computed on the basis of the total rehabilitation costs of the entire multiple building project to a maximum of $2,500. If the $2,500 maximum fee was paid at the time of review of the proposed or ongoing rehabilitation project, no further fee will be charged for review of a Request for Certification of Completed Work.

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200–399	13.00	[3] Jan. 1, 1987
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500–End	28.00	Jan. 1, 1989
11	10.00	[2] Jan. 1, 1988
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500–599	20.00	Jan. 1, 1989
600–End	14.00	Jan. 1, 1989
13	22.00	Jan. 1, 1989
14 Parts:		
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60–139	21.00	Jan. 1, 1989
140–199	10.00	Jan. 1, 1989
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1200–End	12.00	Jan. 1, 1989
15 Parts:		
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300–799	22.00	Jan. 1, 1989
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16 Parts:		
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17 Parts:		
1–199	15.00	Apr. 1, 1989
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18 Parts:		
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280–399	14.00	Apr. 1, 1989
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19 Parts:		
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1–399	13.00	Apr. 1, 1989
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800–1299	17.00	Apr. 1, 1989
1300–End	6.50	Apr. 1, 1989
22 Parts:		
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300–End	17.00	Apr. 1, 1989
23	17.00	Apr. 1, 1989
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1700–End	13.00	Apr. 1, 1989
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81–99	25.00	July 1, 1988
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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] No amendments to this volume were promulgated during the period Jan.1, 1988 to Dec.31, 1988. The CFR volume issued January 1, 1988, should be retained.

[3] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1989. The CFR volume issued January 1, 1987, should be retained.

[4] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[5] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

LIST OF ACTS REQUIRING PUBLICATION IN THE FEDERAL REGISTER, 1989

Additions to Table III, April 10, 1989 through December 19, 1989

This table lists the subject matter, public law number, and citations to the U.S. Statutes at Large and U.S. Code for those acts of the first session of the 101st Congress which require Federal agencies to publish documents in the Federal Register. Table III appears in the CFR Index and Finding Aids volume revised as of January 1, 1990.

Description of Act	*Citation*
Whistleblower Protection Act of 1989	Public Law 101-12; 103 Stat. 20; 5 U.S.C. 1212.
Financial Institutions Reform, Recovery, and Enforcement Act of 1989	Public Law 101-73; 103 Stat. 357; 12 U.S.C. 1437 note; 103 Stat. 358; 12 U.S.C. 1437 note; 103 Stat. 386; 12 U.S.C. 1441a; 103 Stat. 529; 12 U.S.C. 1833d.
Disaster Assistance Act of 1989	Public Law 101-82; 103 Stat. 588; 7 U.S.C. 1508a.
Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990.	Public Law 101-162; 103 Stat. 1002.
Department of Transportation and Related Agencies Appropriations Act, 1990.	Public Law 101-164; 103 Stat. 1094.
Foreign Operations, Exporting Financing, and Related Programs Appropriations Act, 1990.	Public Law 101-167; 103 Stat. 1242.
National Defense Authorization Act for Fiscal Years 1990 and 1991	Public Law 101-189; 103 Stat. 1498; 41 U.S.C. 423; 103 Stat. 1499; 41 U.S.C. 423.
Ethics Reform Act of 1989	Public Law 101-194; 103 Stat. 1723; 18 U.S.C. 207; 103 Stat. 1749; 18 U.S.C. 203; 103 Stat. 1751; 18 U.S.C. 205.
Steel Trade Liberalization Program Implementation Act	Public Law 101-221; 103 Stat. 1888; 19 U.S.C. 2253 note; 103 Stat. 1889; 19 U.S.C. 2253 note.
Anti-Terrorism and Arms Export Amendments Act of 1989	Public Law 101-222; 103 Stat. 1894; 22 U.S.C. 2780; 103 Stat. 1897; 50 U.S.C. app. 2405; 103 Stat. 1898; 22 U.S.C. 2371.
Department of Housing and Urban Development Reform Act of 1989	Public Law 101-235; 103 Stat. 1990; 42 U.S.C. 1439, 3545; 103 Stat. 1993; 42 U.S.C. 3545; 103 Stat. 2000; 42 U.S.C. 3535; 103 Stat. 2017; 42 U.S.C. 3537b; 103 Stat. 2018; 42 U.S.C. 3537b; 103 Stat. 2024; 12 U.S.C. 1715z; 103 Stat. 2034; 12 U.S.C. 1708; 103 Stat. 2035; 12 U.S.C. 1708; 103 Stat. 2045; 42 U.S.C. 1490p.
Omnibus Budget Reconciliation Act of 1989	Public Law 101-239; 103 Stat. 2174; 42 U.S.C. 1395w-4; 103 Stat. 2180; 42 U.S.C. 1395w-4; 103 Stat. 2184; 42 U.S.C. 1395w-4; 103 Stat. 2244; 42 U.S.C. 1395ww note; 103 Stat. 2282; 42 U.S.C. 1396a note; 103 Stat. 2282; 42 U.S.C. 701 note; 103 Stat. 2396; 26 U.S.C. 6662.

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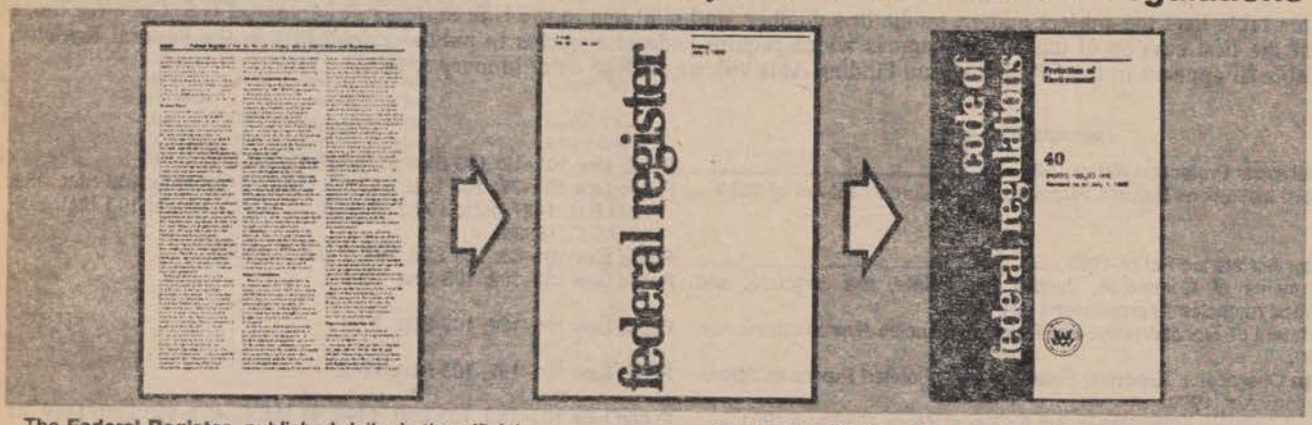

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